TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

~~No. 330.~~ 55

LOUIS BENITES, PLAINTIFF IN ERROR,

vs.

BENJAMIN HAMPTON,

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 1, 1884.

accession 23858

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1 TERRITORY OF UTAH, *County of Salt Lake:*

In the District Court, Third Judicial District.

LOUIS BENITES, Plaintiff,

vs.

H. O. BICKNELL, E. MORRISON, and BENJAMIN HAMPTON, Late Partners Doing Business under the Firm Name and Style of Bicknell, Morrison & Co., Def'ts.

This cause coming on regularly for trial at the February term of said court, to wit, on the 1st day of March, 1881, upon the amended complaint and answer herein, Messrs. E. D. Hoge and Arthur Brown, attorneys for plaintiff, and Messrs. Marshall and Royle, for defendant Hampton, answering herein, a jury of twelve persons is duly empannelled and sworn to try said cause, and same being tried on the 1st and 2nd days of March, 1881, and plaintiff having introduced his testimony and rested his case, the said defendant Hampton, by his attorneys, moves for a judgement of nonsuit, which is allowed by the court, and the court discharges the jury and
2 dismisses the said amended complaint. It is therefor- ordered, adjudged, and decreed that said plaintiff, Louis Benites, take nothing by his said suit from said defendants; and it is further adjudged and decreed that the said defendants do have and recover of and from said plaintiff *his* costs on this behalf expended, and taxed at the sum of $23.90.

Judgement entered March 2nd, 1881.

Endorsed: Title of court and cause. Judgement. Filed March 2nd, 1882. A. J. Averill, clerk, by H. G. McMillan, deputy clerk.

3 *Notice of Intention to Move for a New Trial.*

In the District Court of the Third Judicial District, Territory of Utah.

LOUIS BENITES, Pl'ff,

vs.

H. O. BECKNELL, E. MORRISON, and BENJAMIN HAMPTON, Partners, &c., Def'ts.

To Marshall and Royle, attorneys for defendant, Benjamin Hampton:

Take notice that the plaintiff, Louis Benites, intends to move the court to vacate and set aside the decision of the court and judgment entered in the above-entitled cause, and to grant a new trial of said cause upon the following grounds, to wit, errors in law occurring at the trial and excepted to by the plaintiff; said motion will be made upon a statement of the case.

THEO. BURMESTER,
ARTHUR BROWN, AND
E. D. HOGE,
Att'ys for Plaintiff.

Endorsed: Title of court and cause. Notice of motion for new trial. Filed May 17th, 1881. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

Received a copy of the within May 17th, 1881.

MARSHALL & ROYLE,
Att'ys for Def't Hampton.

T. BURMESTER,
A. BROWN, AND
E. D. HOGE,
Att'ys for Pl'ff.

4 *Proposed Statement on Appeal and Motion for a New Trial.*

In the District Court of the Third Judicial District, Territory of Utah.

LOUIS BENITES, Plaintiff,

vs.

H. O. BICKNELL, E. MORRISON, and BENJAMIN HAMPTON, Late Partners Doing Business under the Firm Name and Style of Bicknell, Morrison & Co., Def'ts.

Copy of complaint, leaving off venue, court, title of action, &c.

Plaintiff complains of defendants and alleges—

I. That H. O. Bicknell, E. Morrison, and Benjamin Hampton, the above-named defendants, were partners in business and doing business in the firm name of Bicknell, Morrison & Co. during the time between the 30th day of June, 1875, and the 31st day of August, 1876.

II. That on the 31st day of August, 1876, the said defendants, as partners, were indebted to plaintiff on a balance of account for goods, wares, and merchandise before that time sold and delivered
5 in the sum of sixteen hundred and sixty-three and $\frac{70}{100}$ dollars.

III. That, being so indebted as aforesaid, there was an account stated by and between plaintiff and defendants on the 13th day of August, A. D. 1878, and upon such statement a balance of sixteen hundred and seventy-three and $\frac{70}{100}$ was found to be due plaintiff from defendants.

IV. That the defendants agreed to pay to the plaintiff the said balance.

V. That no part of the same has been paid.

Wherefore the plaintiff prays judgment against defendants for the said sum of sixteen hundred and sixty-three and $\frac{70}{100}$ dollars, with lawful interest from August 13th, 1878, and costs and disbursements of this action.

THEODORE BURMESTER AND
E. D. HOGE.
Att'ys for Plaintiff.

Complaint was duly verified.

Copy of Answer, Leaving off Caption and Title.

Now comes the above-named defendant, Benjamin Hampton, and makes this his separate answer to the amended complaint
6 filed herein, and says defendant denies that on the 31st day of August, A. D. 1876, or upon any day subsequent to the 4th day of August, 1876, this defendant, together with the said H. O. Bicknell and E. Morrison, as partners or otherwise, was indebted to said plaintiff on an account or on a balance of account, or at all, for goods, wares, or merchandise before that time sold or delivered to them or either of them in the sum of $1,663.70, or in any sum whatever, or that they, as such partners or as copartners, purchased or received any goods, wares, or merchandise from said plaintiff for which they had not paid said plaintiff, and denies that, being indebted to said plaintiff, as stated in said complaint or otherwise, there was, on the 13th day of August, 1878, or at any other day or date since the month of July, 1875, any account stated by or between said plaintiff and defendants, or that upon such indebtedness, as alleged in said complaint, or upon any indebtedness whatever, incurred at any time between said plaintiff and said defend-
7 ants, or upon said or any statement of account between plaintiffs and defendants a balance of $1,663.70, or any other sum whatever was agreed upon to be due, or was found to be due, or was due or owing or has since become due or owing from said defendants to said plaintiff, or that said defendants, as copartners or otherwise, promised or agreed to pay plaintiff said alleged balance or any balance or sum of money whatever.

And this defendant alleges that any account stated at or prior to said month of July, 1875, between plaintiff or any person or persons with whom this defendant now answering was a copartner, was, in said year 1875, fully paid.

MARSHALL AND ROYLE,
Att'ys for Def't Hampton.

Answer duly verified.

The following deposition, which was taken on stipulation of the parties, in the city of Chicago, State of Illinois, was then read in evidence, leaving off the caption and title of the case.

8 Interrogatory I. What is your name, age, occupation, and place of residence?

Answer. My name is Henry O. Bricknell; age, forty-one years; occupation, a book-keeper; residence, Lake View, Illinois.

Interrogatory II. Did you ever live in the Territory of Utah. If yes, state when, where, and what — your occupation while living in said Territory.

Answer. I lived there in the year 1875, at a place called Stockton. My occupation was that of manufacturing charcoal.

Interrogatory III. Are you acquainted with the plaintiff in this action?

Answer. I am.

Interrogatory IV. Are you acquainted with the other defendants

to this action, "to wit," Benjamin Hampton and E. Morrison. If yea, state when and where you became acquainted with and knew each of them?

Answer. I am acquainted with both of them; I became acquainted with E. Morrison in Marquette Co., Lake Superior, Michigan, about the year 1872, and knew him there and afterwards in Stockton, Utah Territory; I became acquainted with Benjamin Hamp-
9 ton in the year 1875, at Stockton, Utah, and knew him there.

Interrogatory V. Did you at any time have any business connection or relations with the other defendants? If yea, state the nature thereof, when the same commenced, and when such relations ceased, if they have ceased.

Answer. I did. I was connected with them in the manufacture of charcoal in Soldiers' Cañon, near Stockton, Utah Territory, commencing with E. Morrison about the first of January, 1875, and afterwards with both E. Morrison and Benjamin Hampton about the 1st of July, 1875, and continuing the same business at the same place [the said Hampton owning one half and the said Morrison and myself owning the other half of the business].

Defendant Hampton, by his counsel, objected to the fifth interrogatory and the answer thereto, for the following reasons:

First. Because the fifth interrogatory is not confined to the dates named in the complaint, to wit, between the 30th day of June, 1875, and the 31st day of August, 1876, or between the 30th
10 day of June, 1875, and the 13th day of August, 1878.

Second. Because the question is not limited to the alleged partnership dealings of the defendants, or to the dates of the existence of any partnership between the defendants.

Third. Because the said contract of partnership, if any such existed, was in writing, and parol evidence of the contents of such writing cannot be given by the witness.

Fourth. Because it is immaterial and irrelevant, and the answer is not responsive to the interrogatory.

The court overruled the objection, except as to that part of the answer included in brackets above, and sustained the objection as to that part of the answer; to which ruling the plaintiff, by his counsel, then and there duly excepted.

Interrogatory VI. If you answer the fifth interrogatory in the affirmative, please state when Benjamin Hampton first became connected with you, and had he become so connected.

Answer. He became connected with E. Morrison and my-
11 self about the first of July, 1875. The trade between us was made in this way: Mr. Hampton came to our kilns in Soldiers' Cañon; we made an inventory of all the fixtures, stock on hand, &c., connected with the business, and its estimated value, in writing; we also made a statement in writing of our liabilities, both of which we gave Mr. Hampton, and proposed to give him a one-half interest in everything connected with the business in consideration that he should assume with us the liabilities. Mr. Hampton accepted our proposition, and Mr. Hampton and myself went down

to Stockton to the office of the justice of the peace, who drew up a bill of sale from Bricknell and Morrison to Benjamin Hampton of one-half interest in our business, which I signed and acknowledged and delivered to Mr. Hampton. The consideration stated in the bill of sale was, I think, one thousand dollars, but Mr. Hampton did not pay us anything, the only consideration being, as I have stated, that he should assume the liabilities of Bicknell and Morrison with us.

12 Defendants object to the 6th interrogatory, making the same objection as to the 5th; also the further objection that the interrogatory limits the transaction to witness and Hampton and not Bicknell, Hampton and Co.

Mr. Royle stated the fact that the contract is in writing, and if the answer gives anything in regard to that, then it is not competent.

Mr. BROWN: There is no evidence that it is.
COURT: The Court will presume it is in writing.

To the ruling of the court plaintiff by, his counsel, then and there duly excepted.

COURT: The deposition itself says it was in writing.

Objection sustained by the court; to which ruling the plaintiff, by his counsel, then and there duly excepted.

Interrogatory VII. If you answer the fifth interrogatory in the affirmative, please state if you had, on or about the first day of July, A. D. 1875, in the store of Benites, in the town of Stockton, county of Tooele, Utah Territory, a conversation with said Benites
13 in the presence of said Benjamin Hampton in relation to the business connections and relations existing between yourself, Hampton, and E. Morrison. If yea, please state fully all that was said at the time by each of you, and if any other person or persons were present please state who they were.

Answer. I do not remember any particular conversation with Mr. Benites; I know we took pains to make it known that Mr. Hampton had bought an interest in the business, and especially to notify our creditors, in order to allay any uneasiness they might have. Mr. Benites was the principal creditor, I think, at the time, and we undoubtedly had a conversation with him as suggested in the question, but I do not remember the particulars in regard to it.

Objected to by def't. Same objection as to 5th quest., and also because a conversation between him and plaintiff, in the presence of Hampton, in relation to the business connections and relations of witness, Hampton, and Morrison, cannot tend to prove any
14 indebtedness from said def'ts to plaintiff. 2nd. Because what Benites said is no evidence against this defendant or said def'ts. 3rd. Because Hampton and E. Morrison are sued as partners in this case, nor is any account alleged to have been stated. Objection overruled, and def't Hampton duly excepted.

Interrogatory 8. If in your answer to the 7th interrogatory you state there was a conversation of the character therein indicated, state what the arrangement had been between you and the other defendants about the three defendants assuming the payment of any indebtedness of yourself and Morrison to Benites.

Answer. The arrangement was that Mr. Hampton should become responsible with Morrison and myself for the debts which we had contracted in connection with the business previous to the time we sold him the half interest. As I before stated, this was the only consideration for the interest we sold him.

(Signed) HENRY O. BICKNELL.

15 Cross-interrogatories:

Interrogatory 1st. If you have answered in reply to the interrogatories of the plaintiff that yourself, Hampton, and Morrison were copartners, then state further whether or not the contract of copartnership, at or about the time of its commencement, was evidenced by any writing, and whether any of terms of said copartnership was reduced to writing, and whether any memorandum in writing of said copartnership was made and signed by the parties or any of them.

Answer. The writings made at the time were, as I before stated, namely, an inventory of all the property belonging to Bicknell & Morrison in Soldiers' Cañon, near Stockton, Utah Territory, consisting of coal-kilns, lime-kilns, horses, wagons, house, tools, &c.; a statement of the liabilities of the firm of Bicknell & Morrison, which included all the debts we owed at the time; neither of these were signed by any of the parties to my knowledge; a bill of sale of an undivided half interest in all the property and business of Bicknell and Morrison, which was written by the justice of
16 the peace of Stockton and signed for the firm of Bicknell and Morrison by me and delivered by me to Benjamin Hampton.

Interrogatory 2nd. To whom was such writing delivered?

Answer. All three of the writings mentioned were delivered to Benjamin Hampton.

(Signed) HENRY O. BICKNELL.

District Court, Third Judicial District, Territory of Utah, Salt Lake County.

L. BENITES, Plaintiff,

vs.

BICKNELL, HAMPTON & Co., Defendants.

MARCH 1st, 1881.

Messrs. Hoge & Burmester, for plaintiff; Messrs. Marshall & Royle, for def'ts.

Defendants accept the jury; jury sworn in; Chief Judge Hoge reads complaint.

JUDGE HOGE: I served notice on the defendants to produce in the trial the account rendered.

Mr. Royle reads notice. We object to the notice even if we
17 had these papers, because it is not alleged or shown they are in our possession; but we answer that they are not in our possession. We didn't receive such a letter as in the notice described; that we are not in possession & did not receive the account in any such letter as in the notice described. We did receive a paper by mail sent from Stockton, Utah, sent to Frisco, Utah, but it is not a paper that plaintiff can use in this action.

This paper has no relevancy or materiality in this action. We are ready to produce the paper we did receive at the proper time, but it is not described in that notice.

L. BENITES sworn for plaintiff.

Examined by Judge HOGE:

Q. Are you plaintiff in this action?
A. Yes, sir.
Q. Are you acquainted with the defendant, Mr. Hampton?
A. Yes, sir.
Q. Are you acquainted with the other defendants, Mr. Bricknell & Mr. Morrison?
A. Yes, sir.
Q. Ask you where you resided in 1875, '76' '77, '78.
A. Stockton, Tooele county, Utah.
18 Q. What was your business during the years '75 & '76?
A. Engaged in the merchandise business, keeping store—general merchandise.
Q. Ask you if there was any account on your books against these defendants during '75 & '76?
A. Yes, there was.
Q. Have you your books in court?
A. There is one here.
Q. Ask you if you ever made out the account of that firm at any time?
A. Yes, sir; made it in August, I guess, '78.
Q. In August, '78?
A. Yes, sir; I made an itemized account.
Q. Do you know what the amount of that account was?

Objected to; that is going into the account.

— Do you know what the amount of that account was?
A. Yes, sir.
Q. You know the result of the footing?
A. Yes, sir.
Q. You say you made out an itemized account?
A. My book-keeper made it.
Q. Did you examine it?
A. Yes, sir.
Q. So that it was correct?
19 A. Yes, sir; according to the books.
Q. What did you do with that account?

A. Well, we put it in an envelope at the request of Mr. Burmester, who was my attorney at the time, and we took it to the post office.

Q. What did you do with it at the post office?

A. My clerk, Bethune, went and registered the letter—sent it to Mr. Hampton, Frisco, Beaver county, Utah.

Q. Can you state to the jury what day of the month that was—what day of August that was that you mailed that letter?

A. The 13th day of August, 1878.

Q. You say you had it registered; did you see *it* yourself that it was registered?

A. Yes, sir.

A. And saw that the registry was made and the fees paid for it?

A. Yes, sir; I paid the registering fees.

Q. Have you got the receipt?

A. I have got one.

Q. Have you a receipt for the registered letter you received there from the post office?

20 A. I don't know which the receipt is. I know I got one when he delivered the letter. I have not got it in my possession just now.

Q. Have you looked for that receipt?

A. I have not.

Q. Have you heretofore looked for it since the commencement of this action?

A. We looked for it, but could not find it.

Q. Have you looked in every place where it was probable or possible that it might be?

A. Yes, sir; I could not find it on account—I moved from Stockton here; all my papers scattered around.

Q. That receipt is not within your control?

A. No, sir; never could find it.

Q. How often have you looked for it—more than once?

A. More than twenty times, probably.

Q. Do you know now that that receipt is not in your possession?

A. Yes, sir.

Q. Have you any mode by which you can give the exact amount of that account or do you remember it from memory?

A. Yes, sir.

21 Q. Do I understand you to say you remember the exact amount of that account?

A. I remember the amount; yes, sir.

Q. Now, I ask you to state to the jury what the amount of that account was.

Objected to, as the account itself is the best evidence of the amount contained in it.

Question withdrawn.

Q. Have you any other manner or mode by which you can establish the amount of that account?

A. By my ledger.

Q. Ask you what the account that you have stated was sent to Mr. Hampton at Frisco; ask you if that was a copy taken from that ledger?

A. Yes, sir.

Q. An exact copy?

A. Yes, sir.

Q. Ask you to produce the ledger.

Witness produced book.

Q. Is that your book?

A. That is one of them. I used to have more than one.

Q. Ask you to look at these pages, commencing with page
22 49, running to 58, both inclusive; ask you if the account you sent to him was a copy of those pages in that book?

Objected to as utterly immaterial, whether it is a copy of what is in that book or not. The best evidence of that account stated is the account itself.

That paper becomes the original. If it is lost or destroyed its destruction must be proved. If it is in our possession they must give us the proper notice to produce it. It is secondary evidence and no foundation is laid for its introduction. It is immaterial, irrelevant, and not the best evidence.

Mr. BROWN: We offer to prove by secondary evidence, if it may be called such, what was contained in the account that was sent.

Objection sustained on the ground that it has not been shown that the defendant Hampton lived at Frisco.

Q. Do you know what Mr. Hampton's post-office address was?

A. Yes, sir.

Q. What was it.

23 A. Frisco.

Q. Beaver county?

A. Yes, sir; doing business there.

Q. How do you know that Mr. Hampton was in business there—did you ever talk with him about it?

A. Yes, sir.

Q. What did he tell you in regard to that?

A. Several times we met——

Mr. MARSHALL:

Q. What time, when, and at what place?

—. ——.

Q. Ask you if after sending this account you ever had a conversation with Mr. Hampton in regard to this account?

A. Yes, sir.

Q. State what he said in regard to receiving this account at that time that you have now spoken of—the one you have spoken of as having mailed to him at Frisco?

Objected to unless this account is identified in some way.

Mr. ROYLE: I desire to cross-examine the witness.

Cross-examined by Mr. ROYLE:

Q. Was that conversation in regard to the settlement of
24 this claim between you and Hampton—in regard to a settlement or compromise?

A. It was in regard to the account—the same account I sent to Frisco.

Q. Was it in regard to a settlement or compromise of this difficulty between you?

A. It was in regard to settlement.

Q. Was an offer to compromise, or talk about a compromise of the claim for a less amount than its face?

No answer.

Q. Was it a talk about a compromise of this claim?

A. We was talking about the account I sent to Frisco.

Q. Ask you if in this conversation you are now asked about there was not a proposition to compromise on one side or the other in regard to this difficulty between you?

A. Yes, sir.

Defendants' counsel object to the pending question of plaintiff's counsel on the ground that what was said was said by way of compromise and is admissable. Objection sustained. Exception.

25 Plaintiff's counsel reserved the examination-in-chief.

Q. At the time this conversation took place, had there been any negotiations entered into in regard to a compromise?

A. Yes, sir.

Q. At the time that he spoke about having received the account?

A. No; not at that very minute. He acknowledged he received the account.

Defendants' counsel move to strike out the answer. Motion granted. Exception.

Q. Ask you if any offers of compromise or negotiations for compromise were not after that—some two or three hours?

A. I think it was the next day, sir.

Q. And the conversation that you have first mentioned was prior—a day previous—to the one in regard to the compromise?

A. Yes, sir.

Q. Now, I will ask you at the time that he made this admission to you about receiving this account, if there was anything said about a compromise farther than you fixed a time when you were to meet and where you were to meet to try to compromise this case?

Objected to as leading.

26 Question withdrawn.

Q. What, if anything, at the time of this admission, was said in reference to terms of a compromise—that is, on the first day, at the time this admission was made?

A. We was talking, me and Mr. Hampton, about this account. He was complaining. He said he never was sued in his life. I don't remember exactly all the conversation we had; he was mad on account of having been sued. He was telling me he had never been sued in his life; those are the principal words I recollect that were in that conversation that day. We continued to talk about the letters he wrote me after he was summoned, telling me he wanted to compromise, and we agreed to meet next day at three o'clock, and, if I am not mistaken, at Mr. Isaac Wolf's office, to talk about a compromise of the case.

Q. At this time—that is, the first day, what was said about a compromise; was there any terms offered by either party?

A. No, sir; not any amount to settle.

Q. Then was there anything more said in regard to a compromise than simply that you were to meet some other day and try to
27 compromise?

A. Nothing more.

Cross-examined:

Q. In the first conversation you say Mr. Hampton kept speaking to you about a letter he had written to you?

A. No; he mentioned a letter he wrote to me from Salt Lake to Stockton after he was summoned.

Q. Was that about a compromise?

A. That letter said something about a compromise; yes, sir.

Q. Was it in pursuance of what was in that letter that you were talking that day?

A. No, not at all about that; it was mentioned in the last of the conversation, when we were talking about meeting next day.

Q. That letter he had written to you previous to that time about a compromise?

A. That wound up our conversation; we agreed to meet the next day at Mr. Wolf's office.

Q. He mentioned that letter in that conversation?

A. He asked me if I had received that letter.

Q. You had not answered that letter before, had you?

A. I guess I had.

Q. Did he ask you in regard to the letter that day—the first day?

A. I don't know whether he asked me in regard to the letter.

28 Q. What did he say in regard to the letter?

A. I don't know if he said anything more than that he offered me in the letter about a compromise.

Q. What did he offer?

A. I don't remember now.

Q. He spoke about an offer he made in this letter of a compromise?

A. It was in the last of the conversation.

Q. The first day, in the first conversation that you had with him, you talked about that letter?

A. In the last, after we agreed to meet in Wolf's office.

Mr. ROYLE: That shows it is a continuous transaction between that letter of compromise, from the time that letter was written, that they met and talked about the same thing, then made an appointment for an additional meeting.

The COURT:

Q. Did the defendant come to your place of business at Stockton in pursuance of correspondence that had been carried on between you and him with reference to a compromise?

A. No, sir.

The COURT:

Q. What brought him to Stockton, if you know?

A. It was right here in the city, on the street, we met accidentally.

Q. You met here for the purpose of compromising?

29 A. No, sir; I did not know that Mr. Hampton was in the city.

Q. At the conversation on the first day was the subject of compromise talked of?

A. No, sir; the subject of receiving this account and the complaint that he had been sued; that is the first of our conversation.

The COURT: I think, then, any conversation that took place before the parties met together for the purpose of compromise would be admissible.

Plaintiff's counsel resume examination.

Q. What did he say in that conversation?

Objected to on the ground before stated. Objection overruled. Exception.

Q. Ask you what he said in reference to receiving this account, if anything?

Objected to as leading. Objection sustained.

Q. What did he say?

A. He said what I said before, that he had never been sued; complained. I don't recollect what words were used; he said it was the first time he was ever sued in his life.

Q. Go on.

A. I said, Ben., it is your fault. Why didn't you answer me when you received my account?

Q. What was his reply to that, if anything?

A. He said he neglected it—something like that. I think he said neglected.

30 Mr. BROWN: We now offer the account, or, rather, we offer the question we asked awhile ago, whether that account was a copy from this ledger.

Objected to, as they have not given proper notice to produce any account. The account is not identified.

Defendants' counsel offer to produce any account that they received if plaintiff's counsel gives proper notice.

Object further to the testimony that it is not proved that Frisco was where Mr. Hampton resided or was where his post-office address was.

Q. Did you ever send any other letter, registered, to Mr. Hampton directed to Frisco except the one you have spoken of?
A. That is the only one in all the business transactions.

Court reads notice to produce accounts.

Objection overruled. Exception.

Mr. ROYLE: We will, then, produce the paper.
Mr. BROWN: I ask the witness if the account he sent was copied from the ledger?
A. Yes, sir.

Ledger offered in evidence.

Objected to, as defendants' counsel have produced the paper they sent and the suit is brought on an acount stated.

By the COURT: For what purpose is it offered?
Mr. BROWN: To show secondary evidence of the account.

Objected to because it is secondary evidence and defendants
31 counsel have produced the account called for.

Mr. BROWN: I offer from pages 49 to 58, inclusive.

Objection sustained. Exception.

Q. Ask you to examine that and see if that is the paper you sent?
Q. Yes, sir; that is it; it is the same one.

Account offered in evidence by plaintiff's counsel, a copy of which is hereto attached, marked Plaintiff's Ex. A & Hunter J.

Objected to on the ground that it is not an account stated to Bicknell, Morrison & Co. It is not an account in which Mr. Hampton has any interest. No part of it is an account to Bicknell, Morrison & Hampton. It is not signed or subscribed by any one. It does not purport to come from any one or be authorized to be sent by any one, and it is a variance between the allegation and the proof.

Mr. BROWN: We shall offer proof to show that on the 30th of June the account, which was originally commenced with Bicknell, and Morrison, was transferred for consideration to Bicknell, Morrison and Hampton.

Objection sustained. Exception.

Judge HOGE: We now offer the deposition of Mr. Bicknell, one of the parties defendant.

Mr. ROYLE: We object to this deposition because, first, they should show an account stated before they introduce the evidence that is contained in this deposition. They have shown just the
32 contrary—that there never was an account stated. We object to the depositions further, and to the first, second, third, and fourth interrogatories, because, first, the residue of the interrogatories aforesaid show that the evidence sought from this witness, to which the first four interrogatories are introductory, is, for the reasons hereinafter given as objections to said other interrogatories, inadmissible, immaterial, and irrelevant, and the meaning of that is the first four being introductory to something that comes afterwards, and that matter coming afterwards being inadmissible the first four are because they are simply introductory to questions which the witness should not be permitted to answer.

We object to the fifth interrogatory, first, because the interrogatory is not confined to the dates named in the complaint, to wit, between the 30th day of June, 1875, and the 31st day of August, 1876, or between the 30th of June and the 13th of August, 1878.

Second. Because the question is not limited to the alleged partnership dealings of defendants or to the dates of the existence of any partnership between the defendants.

Third. Because the said contract of partnership, if any such existed, was in writing, and parole evidence of the contents of such writing cannot be given by the witness.

33 Fourth. Because it is immaterial and irrelevant, and the answer is not responsive to the interrogatory. We object to the sixth interrogatory, making the same objection as to the fifth, and also the further objection that the interrogatory limits the transactions to witness and Hampton, and not Bicknell, Hampton and Company.

Defendants' counsel object to the 7th interrogatory, making the same objection as to the fifth interrogatory, and also the further objection, to wit:

Because a conversation between witness and plaintiff in the presence of Hampton in relation to the business connections and relations of witness, Hampton, and Morrison cannot tend to prove any indebtedness of said defendants to plaintiff.

Second. Because what Benites said is no evidence against this defendant or said defendants.

Third. Because Hampton and E. Morrison are not sued as partners in this case, nor is any account alleged to have been stated between them.

Defendants' counsel object to the eighth interrogatory on the same grounds as to the fifth and seventh interrogatories, and the further objection, to wit:

First. Because it is immaterial what arrangements had been made between the witness and said other defendants about the three defendants assuming the payment of any indebtedness of Bicknell and Morrison to plaintiff to which said Benites was not a party,
34 and which was not a promise in writing entered into with plaintiff and signed by defendants.

Second. Because if such an arrangement was made between defendants, and if, farther, it was communicated to plaintiff, to be in anywise legal and binding on defendants, such agreement or some note or memorandum thereof in writing and expressing a consideration should have been made and signed by said defendants, and such writing is the best evidence; and, further, that there is no consideration for the promise; and, in addition to these objections to the deposition, we make this general objection that the deposition attempts to go back into past transactions out of which this account stated and new promise to pay is said to have arisen, and that is not proper.

Mr. BROWN: We offer the first interrogatory of the deposition.

Court overrules the objection. Defendants' counsel excepts.

Second interrogatory offered.

Objection overruled. Exception.

Third interrogatory offered.

Objection overruled. Exception.

Fourth interrogatory offered.

Objection overruled. Exception.

Fifth interrogatory and answer offered.

35 Objection to the latter part of the answer sustained, commencing with the words: "The said" portion marked on the deposition by including brackets.

Sixth interrogatory and answer offered.

Objection overruled. Exception.

Mr. ROYLE: I state the fact that the contract is in writing, and if the answer gives anything in regard to that then it is not competent.

Mr. BROWN: There is no evidence that it is.

COURT: The court will presume it is in writing.

Plaintiff's counsel except to the ruling of the court.

COURT: The deposition itself says it was in writing.

Objection sustained. Exception.

Seventh interrogatory and answer offered.

Objection overruled. Exception.

Eighth interrogatory offered.

Defendants' counsel interposes an additional objection, because it is not within the statute of frauds in substance; and further, that they are going back of the account stated to prove items in the transaction between the parties, which are not legitimate and proper. They must prove the account stated, and cannot go back into the items of the account. We object to their doing so, or showing as to how this account stated was made up.

The COURT: Of course, if the purpose of this question is to go to that extent, I will hold again as I held before, as I understand you don't claim any such thing, and don't propose to go behind.

Objection overruled. Exception.

36 Examination of BENITES resumed:

Q. Ask you if Mr. Bicknell, Morrison & Hampton or Bicknell and Hampton came to your store at any time along about the first of July, '75?

A. Yes, sir.

Q. Can you state on what day they came there?

A. They came there the 1st day of July, 1875.

Q. Did you have any conversation with them in reference to their business relations?

Objected to for the reason that you cannot go back of the account stated; that it is immaterial and irrelevant—all this evidence in regard to what took place anterior to making up this account.

A. I had a conversation; yes, sir.

Q. Ask you to state what that conversation was?

Objected to, as stated above, that they cannot go behind the account stated and show what makes up the account stated. The account stated is the foundation upon which they must rely, and, unless they surcharge for fraud or mistake, the items of the account cannot be enquired into, nor what constituted that account cannot be inquired into. Any evidence anterior to the statement of the account is irrelevant and immaterial.

Objection overruled. Exception.

COURT: I am not admitting the testimony for any item of this account.

37 Judge HOGE: We now ask them to produce the bill of sale and the inventory that were so delivered at that time—the papers described in the interrogatory—I think it is the sixth one—the one that was stricken out because it appeared the matters were in writing.

Adjourned until to-morrow at 10 o'clock, March 2nd, 1881.

Mr. MARSHALL: Notice was given to us to produce certain papers; after an examination of our papers we find two of them, the articles of copartnership and the bill of sale, in our possession; the inventory we cannot find.

Question read. Ask you to state what that conversation was.

Objection renewed. Objection sustained. Exception.

Q. Do you know who constituted the firm of Bicknell, Morrison and Co.?

Objected to because there is written evidence of the parties who composed the firm, the articles of co-partnership which have been

put into the hands of plaintiff's counsel, and further that there is no question in the pleadings as to who composed the firm, and it is not proper evidence, and is immaterial on that ground. Objection overruled. Exception.

A. Yes, sir.

Q. Please state.

A. H. O. Bicknell, Edward Morrison, or Ed. Morrison, and
38 Benjamin Hampton.

Q. Ask you now if you had any business transactions with Bicknell & Morrison, as a firm, prior to the 1st day of July, 1875?

Objected to as immaterial and irrelevant to this issue; they cannot go back of the account stated, and it does not tend to show an account stated in 1878. Objection overruled. Exception.

A. Yes, sir.

Q. Ask you, then, if you had any business transactions with Bicknell, Morrison & Hampton on the first of July, 1875?

A. Yes, sir.

Q. Ask you how long a period those business transactions covered with Bicknell, Morrison & Hampton?

A. I think it was until the month of August; don't recollect the date exactly.

Q. The same year or the following?

A. The same year—1875.

Q. From July to August, 1875?

A. I don't remember the date.

Q. And from '75 until the present time?

A. I don't know of the firm having changed; they never notified me that the company had dissolved.

Q. You don't know of the dissolution of the company?

A. No, sir.

Q. What I want to call your attention to is, How long did the transactions between you and them as a firm exist?

A. From three years or four—from that time.

39 Q. You have stated you were merchandizing?

A. Yes, sir.

Q. What period did the account run over?

A. The period ran all the year 1875.

Q. Any portion in '76?

A. Well, there was some in '76 and '77; there was some dealings; I could not recollect their dates.

Q. Can you look at this account in your book & tell?

A. It was from that time up to January, '76.

Q. Give the duration, the period of dealings with the whole firm, from the 1st of July, '75, until when.

A. January 26th, 1876, was the last up to February, '77, I guess, up to August 31st, 1876. Some is debit and some is credit. I can't look at all of them at the same time.

Q. Now, please state what the nature of those transactions were; was it for groceries sold or delivered or moneys lent?

Objected to on the same grounds as before, and also that it is leading.

Mr. BROWN: We offer to prove that on the 31st day of August, 1876, the said defendants, these parties, were indebted to plaintiff on balance of account for goods, wares, and merchandise before that time sold and delivered in the sum of $1,663.76. This particular question is provided to show that it was goods, wares, and merchandise sold & delivered. I claim that is a cause of action alone.

40 I propose to show under that item that we delivered him 1,663.76 dollars' worth of goods, ware-, and merchandise.

Objection overruled. Defendants' counsel except.

A. For goods and merchandize sold and delivered; I don't know but one item was money loaned. I don't know if it was in the bill there.

Mr. MARSHALL: This places us in this position: We could not demur to the count for goods, wares, and merchandise sold and delivered, because the action was on an account stated and the other matters were mere matters of inducement. We are taken by surprise by your honor's ruling. The gentleman has now fallen back on the matter of inducement, which stated the consideration for the account stated. I wish to plead right at once, to meet your honor's rulings, the statute of limitations to this first count.

Mr. ROYLE: On the first count the matter of inducement in regard to goods, wares, and merchandise sold and delivered is not sufficient to state a cause of action, because it does not state to whom the goods were sold and delivered. If your honor persists in that ruling we will ask time to plead the statute of limitations. We ask substantially the court to reconsider the ruling.

41 Court reconsiders its ruling and holds that the plaintiff is confined to this action on the account stated.

Plaintiff's counsel except.

Plaintiff's counsel offer in evidence the articles of copartnership.

Objected to for the reason that it is immaterial.

Mr. BROWN: I offer it only for the purpose of fixing the firm name.

Mr. MARSHALL: We have admitted it in the pleadings and we admit it now.

Objection withdrawn.

Articles of copartnership read in evidence, a copy of which articles of incorporation are hereto attached, marked "Copy articles copartnership."

Mr. BROWN: I now offer this account, marked Plaintiff's Exhibit "A," for identification.

Objected to because it is not an account against Bicknell, Morri-

son & Co., and it is not an account upon which Hampton can in anywise be charged. It is not the account they have declared open; it varies from the account set up in the complaint.

Mr. BROWN: I now offer this account, beginning at the item June 30th, "balance due on settlement and charged to Bicknell, Morrison & Hampton."

Same objection, and the further objection that they cannot
42 cut up the account that they have themselves rendered and make selections from it; it must stand or fall as a whole.

Objection sustained. Exception.

Q. You stated, I believe, that you had never sent but one account to Mr. Hampton?

A. Yes, sir.

Q. You further stated that the first conversation you had with him in the city here that he acknowledged the receiving of that account?

A. Yes, sir.

Q. Now, sir, in that conversation, what account did you have reference to—you and Mr. Hampton?

A. That account you have in your hand.

Q. It was this account?

A. Yes, sir.

Q. Ask you what Mr. Hampton said, if anything, in regard to this account being correct?

Objected to as he had already gone over all *the* that matter, and object to the question as leading.

Q. What did he say in reference to this account?

Same objection. If he wants to go over all that conversation again the proper way would be to ask him what was said in that conversation.

WIT. He acknowledged the account was correct.

43 Question read.

Objected to, as he has been over the same ground, and it having appeared now to the court that the account, if it was rendered, is not an account stated to Bicknell, Morrison & Co., what the witness and Hampton may have said about — is improper; in any event, it is irrelevant and immaterial. Objection overruled. Exception.

Q. Was there anything further in that connection?

A. He said he neglected answering it?

Q. What did he say in regard to the credit which he was entitled to on this account which he had not got?

Objected to as leading. Objection sustained.

Q. Did he say anything with regard to being entitled to credit?

A. Yes, sir.

Q. What did he say?

A. He said in the account I didn't give him credit for a note he held against me for $200, three years past, and interest. I told him I thought to give him credit for that note, because he never surrendered it to me, and he never surrendered it as he agreed to release it; it was given to a third party. I told him I didn't give him credit on the account, because he never surrendered me the note, as he agreed to release me from a third party.

44 Q. He agreed to take the note up?

A. Yes, sir.

Q. You spoke of a conversation taking place the next day at Mr. Wolfe's office in regard to a compromise of the suit that was then pending?

A. Yes, sir.

Q. Now, sir, I will ask you what account was spoken of in that conversation?

Objected to, because it appears manifestly it was in regard to a compromise. Objection sustained. Exception.

Judge HOGE: I will state, if your honor please, what the object of the question is, not that I expect your honor to change your ruling at all, but simply that it may go on the record, for the purpose of showing that in the conversation in regard to the compromise of the suit which was brought that this account now offered in evidence and marked Exhibit "A" was the account that then was under discussion for compromise and included in this suit.

We offer again in evidence Exhibit "A," this account having been identified as it has been by this evidence.

Same objections as before, on the same grounds. Objection sustained. Exception.

Cross-examination waived.

45 Judge HOGE: We offer to prove by Mr. Lawrence Bethune, and also by Mr. Isaac Wolfe, that in the conversation for a compromise that has been spoken of by the witness who has just left the stand that the defendant Hampton admitted the correctness of this account, with the exception of a note of $200, which he claims he ought to have been credited with, and that Mr. Benites replied that the reason the credit was not given was because the note had not been surrendered to the plaintiff.

Defendants' counsel make the same objections that were made to the introduction of the testimony by Mr. Benites, with the additional objection that the conversation and talk was by way of compromise, and therefore is inadmissable. Objection sustained. Exception.

Plaintiff rests.

Defendant Hampton, by his counsel, now moves the court that the plaintiff be nonsuited for the following reasons: First, because there is no evidence to sustain the allegation of the complaint that

an account was stated between plaintiff and defendants; second, there is no evidence of any accounting between the plaintiff and the defendants named in this action, or of any sum found to be due and owing from said defendants to said plaintiff, or of any promise to pay the same.

Motion granted.

Plaintiff's counsel except.

46 *Copy of Articles Copartnership.*

STOCKTON, TOOELE COUNTY, *July 1st*, 1875.

For and in consideration of the sum of one thousand dollars to me in hand paid by Ben. Hampton, receipt whereof is hereby acknowledged, we hereby sell and transfer to him, the said Hampton, a one-half interest, undivided, in our charcoal-kilns, material, buildings, improvements, and business of charcoal burning, all said property being situate in Soldiers' Cañon, near Stockton, Tooele county, Utah, said property consisting of three charcoal-kilns, one lime-kiln, two hundred bushels of lime and boarding house, five coal-boxes, about two thousand bushels of charcoal, one kiln centre, extra staging, iron door frames, brick, tools, wood and coal now in kilns.

It is mutually agreed that said Hampton and the undersigned, Bicknell and Morrison, are to carry on the charcoal business from this date under the firm name of Bicknell, Morrison and Co., H. O. Bicknell and E. Morrison owning one-quarter each and B. Hampton one-half in said firm and business.

(Signed) BICKNELL & MORRISON.

Attest: J. H. LATEY.

47 TERRITORY OF UTAH, } *ss:*
County of Tooele, }

On this 1st day of July, 1875, personally appeared before the undersigned, a justice of the peace in and for said county, H. O. Bicknell, of the firm of Bicknell and Morrison, who acknowledged to me that he executed the within bill of sale of his own free will and accord and for the uses therein stated.

In witness whereof I have hereunto set my hand the day and year first above written.

E. C. CHASE,
Justice of the Peace.

48 (Copy.)

PLAINTIFF'S EX. "A." HUNTER, J. 1871.

Bicknell and Morrison in ac. with L. Benites.

1875.			
April	25.	To 20½ ℔ nails, 2.00; 30th, 5 ℔, 60c.	2 60
May	4.	" sundries, 1.25; 5th, tobacco, 30c.	1 55
"	5.	" order Cummins, 16.00; sundries, 2.00	18 00
"	7.	" tobacco, 3.45; 9th, mdse., 9.17	12 62
"	10.	" sundries, 4.35; mdse., 2.00	6 35

May	11.	To sundries —; 13th, tobacco, 1.50	6 55
"	14.	" mdse., 5.10; 15th, sundries, 3.65	8 75
"	16.	" " 7.00; 17th, mdse., 13.75	20 75
"	17.	" lard, —; 21st, sundries, 7.65	12 90
"	21.	" sundries, 2.75	2 75
"	22.	" tobacco, 1.20; 24th, sundries, 75c.	1 95
"	24.	" sundries, 11.15; 25th, P. O. order —	27 15
"	26.	" " 15.75; 29th, mdse., 2.00	17 75
"	29.	" " 20.65; 30th, " 8.50	29 15
June	1.	" goods p'd P. Johnson, 2.75; mdse., M. Scanlon, 2.50	5 25
"	2.	" 164 lb barley, 5.74; p'd order Rodgers, 3.00	8 74
"	3.	" coffee, 1.20; 30 lb beans, 3.00	4 20
"	"	" 100 lb flour, 5.00; 5 lb currants, 1.00	6 00
"	"	" 1 chopping-knife, .25; 1 bowl, .75	1 00
"	"	" 1 box cinnamon, .35; 1 lb tea, 85c.	1 20
"	5.	" 2 boxes potatoes, 2.00; 1 keg syrup, 5.50	7 50
"	"	" ½ gal. vinegar, .50; 10 bars soap, 1.00	1 50
"	"	" 1 ax & handle, 2.25; 20 lb sugar, 3.60	5 85
"	"	" 10 doz. eggs, 2.50; thread, .25	2 75

49

June	3.	To 2 plugs tobacco, .50; 10 lb nails, 1.25	1 75
"	8.	" 90 lb oats, 3.37; 2 shirts, 2.00	5 37
"	"	" 1 dumper, 2.25; 2 lb candles, 50c.	2 75
"	"	" tobacco, 1.50; 1 p'r overalls, 2.00	3 50
		Am't carried forward	226 18
1875.			
June	8.	" amount forward	226 18
"	11.	" powder, 50c.; tobacco, 50c.	1 00
"	"	" butter, 2.45; tea, 80c.	3 25
"	"	" coffee, 40c.; sage, 20c.	60
"	"	" 1 box pepper, 35c.; 1 12-lb iron bucket, 1.50	1 85
"	13.	" 6 lb powder, 1.50; flour, 2.50; sugar, 2.00.	6 00
"	"	" p'd order Thomas Lyons	10 00
"	14.	" 2 overshirts, 2.00; note paper, .25; sugar, 2.10	4 35
"	15.	" axle-grease, 50c.; 100 lb potatoes, 1.50; 50 lb flour, 2.50	4 50
"	"	" 1 bucket lard, 5.35; 10 doz. eggs, 2.50	7 75
"	"	" 16 lb apples, 16c., 2.56; sack, .50	3 06
"	17.	" 20 lb nails, 2.00; 10½ lb butter, 3.15	5 15
"	"	" 1 box ex. lemons, .25; 1 box cinnamon, .50	75
"	"	" 1 pair overalls, 2.00; 1 p'r gloves, 2.25	4 25
"	"	" 10 lb brown coffee, 4.20; 1 raw-hide whip, .25	4 45
"	"	" 100 lb flour, 5.00; 18 lb tobacco, 90c.	5 90
"	19.	" 25 lb sugar, 5.00; 30 lb beans, 3.00	8 00

June	19.	To tea, .80; 10 lb rice, 1.50; 12 lb bacon, 3.00	5	30
"	"	" 1 can mustard, .75; tobacco, 1.00; potatoes, 1.00	2	75
"	"	" sugar, 1.00; tea, .80	1	80
"	"	" 2 lb tobacco, 1.00; soap, .25	1	25
"	21.	" 2 boxes pepper, .70; 1 chain, 8.00	8	70
"	22.	" 364 lb oats, 12.75; four sacks, 2.00	14	75
"	"	" 30 lb nails, 3.00; 1 bucket, 40c.	3	40
"	"	" 1 currycomb, .15; 397 lb potatoes, 6.25	6	40

50

June	22.	" 17½ lb butter, 5.35; 4-gal. jar, 1.50	6	75
"	"	" 1 p'r boots, Scanlan, 7.50; ex. lemon, 50c.	8	00
"	23.	" 1 lb H nails, .40; 23rd, 50 lb flour, 2.75	3	15
"	"	" 11 lb sugar, 2.00; 2 lb tea, 1.70; 10 lb coffee, 4.00	7	70
		Am't f'w'd	366	99
1875.		To amount forward	366	99
June	23.	To salt, .40; 3 boxes T powder, 1.00	1	40
"	"	" ½ gal. vinegar, .50; 25th, p'd order Geo. Graham, 10.00	10	50
"	26.	" 60 lb oats, 2.10; tobacco, 2.00; ½ lb fine cut, 75c.	4	85
"	27.	" 1 lb candles, 30c.; matches, .10; tobacco, .25		65
"	"	" goods p'd Jno. Williams, 12.75; 28th, p'd order Geo. Graham, 10.00	22	75
"	30.	" 3 shirts, 3.00; socks, .50; tobacco, 2.75	6	25
"	"	" 1 pair boots, 6.50; goods to W. S. Nelson, 23.00	29	50
"	"	" 3 cans lard, 2.55; 1 bot. lemon, .25	2	80
"	"	" soap, .50; matches, .25		75
"	"	" candles, .60; sugar, 2.00	2	60
"	"	" d. apples	1	00
			450	75

1875. Cr.

June	13th.	By two coal checks, $\frac{1}{195}$, $\frac{1}{280}$, 21, $99.75	99	75
"	30.	To balance due on settlement charged to Bicknell, Morrison, and Hampton	350	29
July	1.	To p'd order Geo. Graham, 5.00; p'd S. Nelson, order, 30.00	35	00
"	2.	" 1 doz. eggs, .25; 3d, 26 lb bacon, 5.00	5	45
"	3.	" 10 " 2.50; 100 lbs. flour, 5.00	7	50
"	"	" p'd E. Fleming, 1.00; p'd P. Johnson, 7.75; tob., .25	9	00
"	4.	" p'd order Chas. Johnson, 20.00; Ed. Sanders, 2.00	22	00
"	"	" 10 lb lard, 3.00; p'd Rodgers, 15.00; 10 lb butter, 3.00	21	00

July	6.	To 1 shirt, 1.00; 8th, 160 lb potatoes, 2.40	3 40
51			
July	8.	" 25 lb beans, 2.50; sugar, 50; 1 can must., .75	3 75
"	"	" 9 lb. ham, 1.95; 10 lb. apples, 1.60; 2 cans y. pow. 1.00	4 53
"	"	" 2 ax handles, 1.00; 10 lb. coffee, 4.00	5 00
"	"	" 5½ rope, 165; 100 lb. flour, 5.00	6 65
		" forw'd	473 57
1875.			
July	8.	To am't forward	473 57
"	"	" 32 lb bacon, 6.40; tobacco, .40	6 65
"	"	" 44 lb chain, 9.25; p'd order Geo. Graham, 8.00	17 25
"	"	" p'd Kelly & Co., 2.00; 9 lb sugar, 2.00	4 00
July	9.	" 3 shirts, 4.50; 1 shirt, 1.00	5 50
"	"	" 2 p'r drawers, 2.00; 10th, soap, .50; tea, .80	3 30
"	10.	" yeast powder, .35; tobacco, 3.75; ex. lemon, .25	4 35
"	"	" d. apples, .75; rice, 1.00; 12 lb. butter, 3.60	5 35
"	"	" 10 lb. beans, 1.00; tobacco, 1.90; p'd E. Sanders, 10.00	12 90
"	"	" p'd order to Brim and Seeley, 40.00; 12th making hook, 5.00	45 00
"	12.	" tobacco, 1.00; stamps & envelopes, 1.00	2 00
"	"	" 1 shirt, 4.00; tobacco, .25; order C. W. Shutte, 12.00	16 25
"	"	" 1 ax-handle, 2.25; pain-killer, .35c.	2 60
"	"	" order to J. H. Brim, 7.00; 1 keg powder, 5.50	12 50
"	"	" bot. pain-killer, .35; tobacco, 2.00; pepper, .35	2 70
"	"	" matches, .25; 15th, 2 lb candy, .60; 20 lb. beans, 2.00	2 85
"	16.	" currants, 1.00; vinegar, 1.00	2 00
"	17.	" needles, .15; thread, .25; whiskey & saltpetre, .75	1 15
"	"	" tobacco, .25; boots, 6.50; boots, 7.50	14 25
"	"	" sugar, 2.00; overalls, 2.00; 6 lb. butter, 1.80	5 80
"	"	" tea, .80; soap, .25; 1 bot. lemon, .25	1 30
"	"	" 4 lb. rice, .60; 1 can lard, .85; onions, .50	1 95
"	"	" ye. powder, .50; soda, .25; 18th, p'd Geo. Graham, 15.00	15 75
52			
July	18.	" p'd C. Lyon, 5.00; 3 bots. liniment, 2.25	7 25
"	"	" p'd order L. Munsen, 29.00; 19th, towels, 1.50; tob., 2.00	32 50
"	18.	" 1 pair shoes, 2.25; order to J. W. Alred, 8.00	10 25

July	18.	To p'd Brim and Seeley, 8.00; 19th, 4 bots. liniment, 3.00	11 00
"	20.	" soap, 1.00; pepper, .50; sugar, 2.00; tea, 1.60	5 10
"	"	" 25 lb. rice, 3.75; 20 lb. bacon, 4.40	8 15
		Am't f'w'd	733 22
1875.			
July	20.	To amount forward	733 22
"	"	" salt, .50; 50 lb. beans, 5.00; nails, 1.50	7 00
"	"	" 96 lb. potatoes; 2.90; p'd order to Geo. Rodgers, 7.50	10 40
"	21.	" p'd order E. Sanders, 10.00; 1 can peaches, .40	10 00
"	"	" 2 lb. crackers, .50; cheese, .38	88
"	"	" y. powder, .80; jelly, .60; 2 pairs overalls, 3.50	4 90
"	"	" 2 pairs boots, 14.50; matches, 25; tobacco, 1.00	15 75
"	23.	" sugar, 1.00; lemon ex., .25; tob., 1.00; nails, 2.00	4 25
"	"	" order Thos. Lyons	55 90
"	24.	" 10 lb. nails, 1.00; p'd order J. W. Alred, 5.37	6 37
"	"	" 120 lb. potatoes, 3.60; 1 gal. syrup, 1.25	4 85
"	"	" 2 lb. tea, 1.60; sugar, 2.00	3 60
"	26.	" tobacco, 1.00; coffee, .40; matches, .25; y. pow., .70	2 35
"	"	" 23 lb. bacon, 5.18; 25 lb. beans, 2.50	7 68
"	"	" wood receipts, D. M. Chandler	44 00
"	"	" p'd order J. Bates, 3.50; stamps, .30	3 80
"	27.	" nails, 2.00; tobacco, 1.00; sugar, 1.00	4 00
"	"	" tea, .60; currants, 1.00; rice, 1.00; l. extract, .50	4 10
"	28.	" tobacco, .50; 29th, p'd order Wm. Hope, 6.50	7 00
"	"	" potatoes, 3.60; candles, .60; shirt, 2.25; shirt, 1.00	7 45
"	29.	" p'd order Keptenger, 20.00; shirt, W. Watson, 3.00	23 00
53			
July	30.	" p'd order Wm. Sexton, 50.00; nails, .60	50 60
"	"	" 10 lb nails, 1.00; 2 pairs overalls, 3.50	4 50
"	"	" socks, 1.00	1 00
"	31.	" matches, .25; bacon, 5.63; lard, 3.36	9 24
"	"	" butter, 3.50; y. powder, .70; bacon, 2.25	6 45
"	"	" sugar, 4.00; vinegar, 1.00	5 00
Aug.	1.	" overalls, 1.75; tobacco, 2.00	3 75
"	"	" thread, .25; boots, 7.50	7 75
		Am't forward	1,049 19

1875.				
Aug.	1.	To am't for'd		1,049 19
"	2.	" sugar, 2.00; pepper, .50; b. powder, .56; tea, 1.60		4 60
"	"	" candles, .60; lemon, .50; order Geo. Graham, 7.00		8 10
"	"	" order to Hans Hansen		41 25
"	3.	" nails, 1.00; tobacco, 2.00; beans, 2.70; coffee, 1.20		6 90
"	5.	" tobacco, —; 6 lb bacon, 1.50; overalls, 3.50; flour, 1.50		12 50
"	"	" paper and envelopes, 1.00; order to A. Brim, 1.00		2 00
"	7.	" paid Geo. Graham, 15.00; ax-handle, .50		15 50
"	9.	" 16½ lb rope, 4.90; 10 lb butter, 3.50		8 40
"	12.	" beans, 2.50; rice, 1.50; sugar, 2.00; coffee, 2.00		8 00
"	"	" 37 lb bacon, 8.32; 1 can lard, .85; tea, .40		9 57
"	"	" 6 spoons, .75; tob., 3.00; 165 bot's, 5.77		9 52
"	"	" sugar, .50; rice, .40; y. powders, .50		1 40
"	14.	" order to Geo. Graham, 8.00; tea, 1.60; sugar, 2.00		11 60
"	"	" tobacco, 1.00; l. extract, .50		1 50
"	17.	" cabbage, 1.05; corn, .60; d. apples, 3.52; pepper, .50		5 67
"	"	" soap, .25; allspice, .25; ginger, .50; potatoes, 1.10		2 10
"	"	" matches, .25; hat, 1.50; shirts, 2.50; apples, 3.00		7 25
"	"	" salt, 1.00; onions, 1.95; candles, 1.25; hat, 3.00		7 20
54				
Aug,	17.	" tacks, .50; cucumbers, .50; eggs, .70; wash-dish, 1.20		2 90
"	"	" oil, .80; order J. W. Alred, 8.00		8 80
"	19.	" flour, 2.75; bacon, 2.75		5 50
"	"	" order Geo. Graham		20 00
"	"	" goods F. Brim, 6.15; 21st, axle-grease, .50; tob., .75		7 40
"	21.	" pain-killer, 35c.; goods to Hoffman, 15.00		15 35
"	"	" vinegar, .63; 27th, bacon, 5.95; lard, 6.72		13 30
"	"	" brooms, 1.50; spoons, .50; goods, .25; soap, 1.00		3 25
"	"	" 20 lb butter; 6.00; y. powder, 3.25		9 25
"	"	" sugar, 4.00; 20 lb nails, 2.00		6 00
		Am't forw'd		1,304 10

1875.

Aug.	21.	To am't forward	1,304	10
"	"	" tobacco, 2.00; potatoes, 2.61	4	61
"	"	" lock, 1.25; hinges, .80; baking p., .80; flour, 2.25	5	10
"	"	" overalls, 2.56; bacon, 3.00; y. powder, .40; tea, .40	6	30
"	"	" sugar, .40; tob., 50; onions, .20; 44½ yds. cotton, 5.57	6	67
"	22.	" order Wm. Sexton, 10.00; 23d, pair shoes F. Brim, 2.50	12	50
"	23.	" 100 lb flour, 5.50; 25th, goods to Geo. Harris, 20.00	25	50
"	25.	" sugar, 4.00; tea, .80; can fruit, 1.00	5	80
"	"	" clothes-pins, .20; 37¼ yds. cotton, 4.46	4	66
"	"	" clothes-lines, .70; p'd order, 2.00	2	70
"	26.	" tobacco, 2.00; boots, 7.50; tea, .80; ink, .10; tacks, .20	10	60
"	27.	" goods to Wm. Sexton, 14.50; 28th, p'd order to J. B., 10.00	24	50
"	28.	" p'd order Joe Williams, 25.00; p'd order N. B. Johnson, 15.00	40	00
"	29.	" p'd order Reny Alred, 15.00; p'd order J. Barker & T. Hofman, 10.70	25	70
"	30.	" p'd order G. Goldsmith, 23.00; tob., 2.00; soap, 1.00	26	00
"	"	" sugar, 3.80; tea, 2.40; coffee, .80; matches, .25	7	25
"	"	" lard, 4.95; shoes, 3.00; overalls, 2.50; shoes, 3.00	13	45

55

Aug.	30.	" overalls, 2.50; tobacco, 1.25, p'd Geo. Graham 35.46	39	21
"	"	" shoes, F. Brim, 3.00; order to Chas. Lozie, 1.00	4	00
"	31.	" order to Jn. Seeley, 55.00; Sept. 1st, bacon, 5.00	60	00
Sept.	1.	" ladies'— 1.00; tob., 2.00; order J. H. Brim, 26.55	29	55
"	2.	" order to Bollings, 5.50; order A. Brim, 1.00	6	50
"	3.	" " J. Baker, 10.00; 4 lb. sugar, 3.60	13	60
"	4.	" soap, 1.00; order to Geo. Graham, 114.57	115	57
"	"	" cinnamon & pepper, 1.00; coffee, 1.20; candles, .50	2	70
"	"	" tea, 1.60; bacon, 7.20; lard, 1.65; bacon, 2.50	12	95
"	"	" tobacco, 1.25; rope, .50; tob., 2.00; 3 sod trees	5	75
"	"	" axle-grease, .50; tob., 1.00; paper, .50; goods to Smith, 2.50	4	50

Sept.	5.	To goods, by J. B. Johnson	2 50
		For'd	1,822 27
1875.			
Sept.	5.	To am't forward	1,822 27
"	"	" p'd order to Munsen, 25.00; 6th, 2 shirts, 6.00	31 00
"	6.	" nails, 2.00; 8th, sugar, 4.00; shoes, 2.50	8 50
"	8.	" vinegar, .50; order M. Fairchild, 2.00	2 50
"	"	" p'd order Brim & Hofman	70 00
"	9.	" axle-grease, .50; goods to Munsen, 2.60	3 10
"	10.	" lard, 2.80; syrup, 3.50; tob., 2.00, soap, 1.00	9 30
"	"	" flour, 5.50; boots, 7.50; whiskey, 1.50	14 50
"	"	" condensed milk, 2.00; bacon, 8.10	10 10
"	"	" p'd judgement to P. White, 115.00; 11th, sugar, 400	119 00
"	11.	" lemon, .50; tea, 1.60; coffee, 1.20	3 30
"	"	" salt, .50; matches, .50; 12th, p'd order F. Brim, 14.64	15 64
"	13.	" pepper, .25; pins & needles, .25; sund's, 1.00; tob., 2.00	3 50
"	"	" socks, .45; overalls, 2.50; sausage, .25	3 20
"	"	" order to Geo. Graham, 15.00; order Munsen, 10.00	25 00
"	15.	" tobacco, 3.00; sugar, 2.00; rice, 1.80	6 80
"	16.	" sugar, 2.00; lard, 3.00; flour, 5.50; bacon, 6.60	17 10
56			
Sept.	16.	" pepper, .75; lemon, .50; vinegar, .50	1 75
"	18.	" 85 cords wood, 3.75, 318.75; order to Rodgers, 6.80	324 95
"	"	" order to Mr. Fairchild, 10.00	10 00
"	20.	" tobacco, 3.00; 3 cans milk, 1.50	4 50
"	"	" 18 y'ds bed-ticking, 5.40; 22d, hat., 1.25	6 65
"	22.	" calico, 1.00; sugar, 4.00; 1 hat, 2.00	7 00
"	"	" 1 pick-handle, .50; 25th, order M. B. Johnson, 1.25	1 75
"	25.	" salt, .50; candles, .25; sage, .50; lemon ex., .25	1 50
"	"	" bacon, 5.28; potatoes, 3.00	8 58
"	26.	" 1 pocket-knife, 1.25; tob., 2.00; pepper, .50	3 75
"	27.	" envelopes, .50; pen-holder, .25; paper, 25	1 00
"	"	" order to Joe Williams, 1.50; fuse, 1.50; sugar, 4.00	7 00
		Am't forward	2,543 24
1875.			
Sept.	27.	To am't forward	2,543 24
"	"	" 1 shirt, 2.00; grater, .50; ribbon, .30; powder, 4.75	7 60

Sept.	27.	To lemon ex., .50; soap, 1.00; vinegar, .50; tea, .80	2 80
"	"	" soothing-syrup, .35; 29th, 1 can lard, 5.60	5 95
Oct.	1.	" matches, .25; tobacco, 1.00; 2nd, order to Geo. Graham, 15.00	16 25
"	2.	" p'd order J. Stuart, 50.00; rice, 1.50; y. powder, 1.00	52 50
"	"	" lemon; .50; coffee, 1.20; tea, 2.00, broom, .50	4 20
"	"	" ginger, .50; tea, 1.00; order to Chas. Green, 27.00	29 00
"	"	" order to F. S. Ferris, 25.00; whiskey to Burns, 1.25	26 25
"	4.	" order to Geo. Graham, 1.70; 5th, 1 bot. pectoral, 1.25	2 95
"	5.	" paper & envelopes, .15; order to Geo. Graham, 25.00	25 15
"	"	" butter, 1.60; p'd order E. C. Chase, 8.00	9 60
"	7.	" sugar, 4.00; butter, 1.60; potatoes, 2.00; tob., .50	8 20
"	"	" 2 shirts, 2.00; drawers, 1.00; hat, 2.50; tob., 1.00	6 50
"	8.	" butter, 1.60; potatoes, 3.60; tob., .50; 2 shirts, 2.00	7 70
57			
Oct.	8.	" drawers, 1.00; hat, 2.50	3 50
"	9.	" condition powder, .50; candles, .75; matches, .25	1 50
"	11.	" candles, .75; soap, .25; goods to Burns, 1.50	2 50
"	12.	" apples, 3.90; tob., 1.00; sugar, 3.60; 5 doz. eggs, 1.75	10 25
"	"	" 6 lb butter, —; 13th, p'd order J. R. Burns, 100.50	102 90
"	16.	" 100 lb flour, 5.00; butter, 2.10	7 10
"	"	" coffee, 1.60; tea, 1.60; lard, 1.40; rope, .65	5 25
"	"	" stamped envelopes, .85; note paper, .25; candles, .50	1 60
"	"	" salt, .50; tobacco, 2.00; 17th, 2 cans milk, 1.00	3 50
"	17.	" corn starch, .25; boots, 4.00; socks, 1.00; tob., 1.25	6 50
"	19.	" candy to R. Burns, .50; order to Ed. Fleming, 81.00	81 50
"	20.	" sugar, 1.00; b-acking, 1.00; candles, 1.00; tob., .25	3 25
"	"	" order to Joe Tenant	22 25
"	"	" flour, 2.50; 5 doz. eggs, 1.75; order to C. Lozie, 70.00	74 25
		Forward	3,073 84

1875.				
Oct.	20.	To am't forward		3,073 84
"	21.	" corn, 1.60; butter, 1.60; lard, 1.70; cod-fish, 1.50		6 40
"	23.	" sugar, 2.00; flour, 2.50; potatoes, 1.50; apples, 3.00		9 00
"	"	" lard, 1.70; bacon, 2.70; nails, 1.00; y. powder, .80		6 20
"	"	" candles, .25; tea, .80; 1 gal. oil, .80		1 85
"	26.	" soap, 1.00; milk, 1.00; tobacco, 2.00		4 00
"	"	" tacks, .25; overalls, 2.00; order to F. Pierce, 9.00		11 25
"	"	" y. powder, .50		50
"	"	" butcher'- acc't to Oct. 23rd		404 76
1876.				
Aug.	28.	" cigars, .50; 31st, 100 ft. matched lumber, 9.00		9 50
				3,527 30

58

1875.		Cr.		
July	1.	By check on Goode	84 00	
"	10.	" 5 lb coffee ret'd	2 00	
"	12.	" 80 lb potatoes	3 20	
"	"	" 1 shirt	4 00	
Aug.	2.	" cash from Ben. Hampton	200 00	
"	"	" " " " "	136 46	
"	8.	" check from " "	200 00	
Sept.	6.	" cash from " "	400 00	
"	18.	" check No. 114 on ac.	200 00	
1876.				
Jan'y	26.	" 2 checks, 200.00 each	400 00	
1875.				
Nov.	3.	" 14 cords Quaker, as fi. wood, 3.25	52 50	
"	"	" 34 " mixed " 5.00	170 00	
1876.				
Feb'y	18.	" 336 lb corn	6 72	
"	"	" 210 lb barley	4 72	
				$1,863 60
Aug.	13.	To balance L. Benites		$1,663 70

THEODORE BURMASTER,
ARTHUR BROWN, AND
E. D. HOGE,
Att'ys for Plaintiff.

Assignment of Errors.

1st. The court erred in sustaining defendants' objection to interrogatory 5th of Henry O. Bicknell's deposition, & excluding from evidence such part of the answer thereto as is contained in brackets in the statement herein.

2. The court erred in sustaining the objection to the sixth interrogatory of said deposition.

59 3. The court erred in refusing to permit plaintiff to show that the account sent the def't Hampton was a copy of pl'ff's ledger.

4. The court erred in sustaining the objection to the question put to Louis Benites in chief, to wit: "State what he said in regard to receiving this account at that time that you name was spoken of—the one you have spoken of as having mailed to Frisco."

5. The court erred in striking out Louis Benites' answer, to wit: "No, not that very minute. He acknowledged he owed the amount."

6. The court erred in refusing to allow the ledger containing the account being admitted in evidence.

7. The court erred in refusing to allow plaintiff to introduce the account.

8. The court erred in sustaining objection to plaintiff's offer of the sixth interrogatory and answer of the deposition of Henry O. Bicknell and the exclusion of the same from evidence.

9. The court erred in sustaining objection to the following question to Louis Benites in chief: "Ask you to state what that conversation was." Conversation was the one had by Benites, Bicknell, and Hampton.

10. The court erred in holding that in this action the plaintiff was confined to his action on the account stated.

60 11. The court erred in sustaining objection to the following offer by plaintiff: "I now offer this account, beginning at the item Jan'y 30 to balance due on settlement and charged to Bicknell, Morrison & Hampton."

12. The court erred in sustaining objection to question in chief to Louis Benites as follows: "Now, sir, I will ask you what account was spoken of in that conversation."

13. The court erred in sustaining objection to the introduction in evidence of the account Exhibit "A."

14. The court erred in refusing to allow plaintiff to prove by Lawrence Bethune and Isaac Wolfe that in the conversation for a compromise that defendant Hampton admitted the correctness of the account, with the exception of $2.00, which he claimed he should have been credited with.

15. The court erred in granting defendants' motion of nonsuit.

THEO. BURMASTER,
ARTHUR BROWN &
E. D. HOGE,

Att'ys for Plaintiff.

TERRITORY OF UTAH, } ss:
Salt Lake County, }

We, the undersigned, E. D. Hoge & A. Brown, att'ys for pl'ff, & Marshall & Royle, att'ys for def't Hampton, hereby certify that the foregoing statement has been agreed upon by us, and the same is correct.

Feb'y 1, 1882.

E. D. HOGE &
ARTHUR BROWN,
Att'ys for Plaintiff.
MARSHALL & ROYLE,
Att'ys for Def't Hampton.

61 LOUIS BENITES *vs.* BRICKNELL, MORRISON and HAMPTON.

The motion of plaintiff for a new trial having been heretofore argued and submitted to the court, and the court being now fully advised, and it appearing to the court, upon a review and examination of the record herein, that no error occurred at the trial of said cause, it is ordered that the motion of plaintiff for a new trial herein be, and the same is hereby, overruled; to which ruling and order plaintiff, by his attorneys, duly excepted.

February 23rd, 1882.

Notice of Appeal.

In the District Court of the Third Judicial District of the Territory Utah.

LOUIS BENITES, Pl'ff,
vs.
H. O. BICKNELL, E. MORRISON and BENJAMIN HAMPTON, Partners, &c., Def'ts.

To Marshall and Royle, att'ys for the above-named defendant, Benjamin Hampton, and to the clerk of said district court:

62 Please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of this Territory from the judgment entered in this case on the 2d day of March, 1882, & the order overruling said plaintiff's motion for a new trial therein, made and entered in the said district court on the 23rd day of February, 1882, in favor of the said defendant, Hampton, in said action and against said plaintiff and from *there* the whole thereof.

April 7th, 1882.

E. D. HOGE AND
ARTHUR BROWN,
Att'ys for Plaintiff.

Endorsed: Title of court and cause. Notice of appeal. Filed April 7th, 1882. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

Received copy of within notice April 7th, 1882.

MARSHALL & ROYLE,
Att'ys for Def't, B. Hampton.

E. D. Hoge and Arthur Brown, pl'ff's att'ys.

63 *Undertaking.*

In the District Court of the Third Judicial District, Territory of Utah.

LOUIS BENITES, Pl'ff, *vs.* H. O. BICKNELL *et al.*, Def'ts.

Whereas the plaintiff in the above-entitled action is about to appeal to the supreme court of the Territory of Utah from an order overruling a motion for a new trial entered against plaintiff in said action in the said district court in favor of the defendant Hampton on the 23rd day of February, 1882:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents of the city and county of Salt Lake and Territory of Utah, do hereby jointly and severally undertake and promise, on that part of the appellant, in the sum of two hundred dollars, that the said appellant will pay all damages and costs which may be awarded against Louis Benites, the appellant, on the appeal, or on a dismissal thereof, not exceeding two hundred dollars, to which amount we acknowledge ourselves, jointly and severally, bound.

April 8th, 1882.

L. S. OSGOOD.
HENRY M. MAY.

64 TERRITORY OF UTAH, *Salt Lake County:*

L. S. Osgood and Henry M. May, being duly sworn, each for himself and not one for the other, deposes and says that he is a resident of Salt Lake City and county, Territory of Utah, and that he is worth the amount specified in the foregoing undertaking, over and above his just debts and liabilities, exclusive of property exempt from execution.

L. S. OSGOOD.
HENRY M. MAY.

Subscribed and sworn to before me this 8th day of April, 1882.

[SEAL.] E. D. HOGE,
Notary Public.

Endorsed: Title of court and cause. Undertaking. Filed April 8th, 1882. O. J Averill, clerk.

65 In the District Court of the Third Judicial District, Territory of Utah.

LOUIS BENITES, Plaintiff, *vs.* H. O. BICKNELL *et al.*

Now comes said plaintiff and represents that he is very poor and impecunious and has no means to pay for the printing of the tran-

script on appeal in the above-entitled action. He therefore prays *for* that an order may be made relieving Louis Benites, the applicant herein, from the expense of printing said transcript.

LOUIS BENETES,
By E. D. HOGE & A. BROWN,
His Attorneys.

After reading the foregoing petition, a hearing of the statements of one of the att'ys for applicant in the above-entitled action, it is ordered that the printing of the transcript and record herein may be, and is hereby, dispensed with.

JOHN A. HUNTER,
Judge of said Court.

Endorsed: Title of court and cause. Order. Filed April 8th, 1882. H. G. McMillan, deputy clerk.

66 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, O. J. Averill, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original judgement on nonsuit, notice of intention to move for new trial, statement on motion for new trial and on appeal, order overruling motion for a new trial, notice of appeal, undertaking on appeal, and order dispensing with printing of transcript in the above-entitled action filed in my office.

Witness my hand and the seal of said court, at Salt Lake City, this sixth day of May, A. D. 1882.

[SEAL.]

O. J. AVERILL, *Clerk,*
By H. G. McMILLAN,
Deputy Clerk.

67 Endorsed: Title of court and cause. Order. Filed April 8th, 1882. H. G. McMillan, deputy clerk.

[Endorsed:] In supreme court. Louis Benites, app'l't, *vs.* Benj. Hampton *et a-.*, resp'd'ts. Transcript. Filed May 6th, 1882. E. T. Sprague, clerk.

68 THURSDAY, *June 15th, A. D.* 1882.

A session of the supreme court of Utah Territory was held this day, beginning at 10 o'clock a. m., pursuant to adjournment. * * * Court was duly opened.

* * * * * * *

From 3d Dist.

LOUIS BENITES, Appellant, *vs.* BENJ. HAMPTON *et al.*, Respondents.

This cause coming on regularly for hearing was argued by Messrs. A. Brown and E. D. Hoge, for appellant, and Messrs Marshall and Royle, for respondents, submitted, and taken under advisement.

WEDNESDAY, *July 11th*, 1883.

A session of the supreme court of Utah Territory was held this day, beginning at two o'clock p. m., pursuant to adjournment. Present and presiding, Hon. John A. Hunter, chief justice; present also, Hon. P. H. Emerson, associate justice; the clerk, marshal, and members of the bar.

69 Court was duly opened.

* * * * * * *

From 3d Dist.

LOUIS BENITES, Appellant, *vs.* BENJ. HAMPTON *et al.*, Respondents.

This cause, having been submitted at a former term, and the court being sufficiently advised thereupon, it is now here ordered and adjudged that the judgment of the district court thereupon be, and the same is hereby, reversed, and said cause is remanded to said district court for new trial; and, further, that appellant have and receive of and from respondents the sum of forty-eight dollars, costs. Respondents may file petition for rehearing any time within 10 days after opinion is filed, and remittitur is meantime stayed.

70 WEDNESDAY, *January 16th, A. D.* 1884.

A session of the supreme court of Utah Territory was held this day. * * * Court was duly opened.

* * * * * * *

From 3d Dist.

LOUIS BENITES, Appellant, *vs.* BENJ. HAMPTON *et al.*, Respondents.

On the petition heretofore filed it is ordered that a rehearing of this cause be, and is hereby, granted.

WEDNESDAY, *January 30th, A. D.* 1884.

A session of the supreme court of Utah Territory was held this day. * * * Court was was duly opened.

* * * * * * *

From 3d Dist.

LOUIS BENITES, Appellant, *vs.* BENJAMIN HAMPTON *et al.*, Respondents.

This cause coming on for rehearing, pursuant to leave heretofore granted, was argued by Arthur Brown, for appellant, T. Marshall, for respondents, submitted, and taken under advisement.

71 FRIDAY, *February 1st, A. D.* 1884.

A session of the supreme court of Utah Territory was held this day, beginning at 10 o'clock a. m., pursuant to adjournment. Present and presiding, Hon. John A. Hunter, chief justice; present also, Hon. P. H. Emerson, associate justice, and Hon. S. P. Twiss, associate justice; the clerk, marshal, and members of the bar. Court was duly opened.

* * * * * * *

From 3d Dist.

LOUIS BENITES, Appellant, *vs.* BENJ. HAMPTON *et al.*, Respondents.

This cause having been heretofore heard a second time on leave therefor granted, the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged, Emerson, A. J., dissenting, that the judgment of this court entered the 11th day of July, A. D. 1883, be, and is hereby, set aside and vacated, and the judgment of the district court in said cause be, and is hereby,
72 affirmed; further, that respondents have and recover of and from appellant eleven and $\frac{50}{100}$ dollars costs.

73 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said supreme court before you, between Louis Benites and Benjamin Hampton, impleaded as a partner with H. O. Bicknell and E. Morrison, a manifest error hath happened, to the great damage of the said Louis Benites, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceeding aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on second Monday of October next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 6th day of February, in the year of our Lord one thousand eight hundred and eighty-four.

[Seal of Supreme Court of Territory of Utah, United States of America.]

E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

74 [Endorsed:] Filed Feb'y 6, 1884. E. T. Sprague, clerk.

75 The United States of America to Benjamin Hampton and Marshall & Royal, his attorneys:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Utah Territory, wherein Louis Benites is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not

be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John A. Hunter, chief justice of the said supreme court of the Territory of Utah, this 6th day of February, in the year of our Lord one thousand eight hundred and eighty-four.

JOHN A. HUNTER,
Chief Justice of the Supreme Court of Utah Territory.

76 [Endorsed:] Filed Feb'y 6th, 1884. E. T. Sprague, clerk.

Received a copy of the within citation this Feb'y 6th, A. D., 1884.
MARSHALL & ROYLE,
Attorneys for Benjamin Hampton and Defendant in Error.

77 Know all men by these presents that we, Louis Benites, George A. Mears, and J. E. S. Russell, are held and firmly bound unto Benjamin Hampton in the full and just sum of four hundred dollars, to be paid to the said Benjamin Hampton, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of February, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately, at a session of the supreme court of Utah Territory, in a suit depending in said court between Louis Benites, plaintiff, and Benjamin Hampton, who is impleaded as a partner with H. O. Bicknell and E. Morrison, were defendants, judgment was rendered against the said Louis Benites in favor of the said Hampton, and the said Louis Benites having obtained a writ of
78 error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Benjamin Hampton, citing and admonishing — to be and appear at the Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Louis Benites shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

LOUIS BENITES. [SEAL.]
GEORGE A. MEARS. [SEAL.]
J. E. S. RUSSELL. [SEAL.]

Approved by me this 6th day of February, A. D. 1884.
JOHN A. HUNTER,
Chief Justice of Utah.

79 [Endorsed:] Benites *vs.* Hampton. Bond. Filed Feb'y 6th, 1884. E. T. Sprague, clerk.

80 LOUIS BENITES, Appellant,

vs.

H. O. BICKNELL, E. MORRISON AND BENJAMIN HAMPTON, Partners under the Firm Name of Bicknell, Morrison and Company, Respondents.

The complaint alleges that the defendants, between the 30th day of June, 1875, and the 31st day of August, 1876, were partners doing business under the firm name of Bicknell, Morrison & Company.

"That on the 31st day of August, 1876, the said defendants, as partners, were indebted to plaintiff on a balance of account for goods, wares, and merchandize before that time sold and delivered in the sum of sixteen hundred and sixty-three and $\frac{70}{100}$ dollars."

"That, being so indebted as aforesaid, there was an account stated by and between plaintiff and defendants on the 13th day of August, A. D. 1878, and upon such statement a balance of sixteen
81 hundred and seventy-three and $\frac{70}{100}$ dollars was found to be due plaintiff from defendants."

That the defendants agreed to pay to the plaintiff the said balance; "That no part of the same has been paid," and prays judgement for $1,163.70.

The separate answer of defendant Hampton is an admission of the partnership of the defendants as alleged in the complaint, but is a denial of all the other material allegations of the complaint; the other defendants made no answer.

There was evidence from which the jury might well find that Bricknell and Morrison were partners from about the first day of July, in 1875, in the business of burning lime and charcoal; that on or about the last-named day they caused an inventory of their partnership assets and a statement of their partnership debts to be made, and sold to Hampton one-half of their partnership property, in consideration of which he agreed to become responsible for, and did make himself responsible for, and assumed the payment of one-half the partnership debts of Bicknell & Morrison existing at that time, and that the plaintiff was a large creditor; that from the first
82 day of July, 1875, to the 31st day of August, 1876, the defendants were partners—Bicknell and Morrison each owning one-quarter part interest, and Hampton an interest of one-half in the partnership assets or property.

That on the 13th day of August, 1878, Hampton lived at Frisco, Beaver county, in the Territory of Utah, which was his post-office address.

That the plaintiff Benites lived at Stockton, in this Territory, and on the last-named day caused the account, which he claims in his complaint to be "an account stated by and between the plaintiff and the defendants," the balance of which he alleges the defendants promised to pay to him as the balance due on such account stated, to be put into an envelope properly directed to the defendant Hampton at Frisco, Utah Territory, the expenses, fees, and postage thereof and thereon to be prepaid, and deposited the same in the post office at Stockton, in this Territory; that Hampton admits the

receipt thereof and said he neglected to write to the plaintiff about it or to take any notice of it. But the record fails to show any testimony as to the distance between Frisco and Stockton or how long — time was necessary or usually taken to convey the mail from Stockton to Frisco or how frequently it was conveyed between
83 these two places; that defendant Hampton, after this action was commenced, and service upon him was made, acknowledged to the plaintiff that he had received the account, and said that he had neglected to write to plaintiff about it or to take any notice of it; he also said that he ought to have had credit for a certain note by him mentioned and described; but the record before us nowhere shows when the suit was commenced or service upon either of the defendants was made.

The account enclosed in the envelope and sent to Hampton commences as follows:

"1871. Bicknell & Morrison in ac. with L. Benites.

1875. April 25th.	To 20¼ lbs. nails		2 00
30th.	5 lbs.		60
			2 60"

And from and after the date of this first item there were more or less items of account on almost every day until June 30th, 1875, when this item appeared in the account:

"To balance due on settlement charged to Bicknell, Morrison, and Hampton, 350.29."

The account has, then, almost daily items on one side or the other, the last item being "1876. Feb. 18th, a credit of 210 lbs. barley, $4.72;" at the bottom or end of the account is "August 13th.
84 To balance due L Benites, 1,663.70."

This account was offered in evidence by the plaintiff; it was objected to by the defendant, and the court sustained the objection.

Upon motion of the defendant Hampton the court directed a nonsuit. The plaintiff excepted, and appealed to this court.

The paramount questions in this case are, Did the district court err in refusing to permit the account to go to the jury, and in sustaining the motion for a nonsuit?

By our statute a judgement of nonsuit may be entered by the court, upon motion of defendant, when upon trial the plaintiff fails to prove a sufficient case for the jury. When the parties to an account have examined it, and have expressly agreed upon a certain sum of money as the balance justly due from one party thereof to the other, then such an account has become an account stated, and an action upon it is not founded upon the original items, but upon the balance ascertained by the mutual accounting of the parties. "Upon an *in simul computarsent* the plaintiff is not obliged to give evidence of the articles. It is sufficient if he prove the account stated." Union Bank *vs.* Knapp, 3 Pick., 96.

85 The effect of an account stated is to establish *prima facie* the accuracy of the balance found due without other proof. The burden of proving that an account is stated or settled is upon the party making such allegation; but it is not always necessary, in proving an account stated, to show an actual examination of the items of account or demands of the respective parties thereto, or that there has been an express assent or agreement on the part of the party sought to be held liable upon an alleged account stated that it is correct. This may be implied from circumstances. If an account be presented for payment by one party thereto to the other, and the other party, upon an examination of it and after a reasonable time has elapsed makes no objection to it, it may be legitimately presumed that he was satisfied with it as presented, and this presumption is so strong that a suit can be maintained upon the account, as an account stated, without proof other than that the account was presented with a demand for payment, that reasonable time and opportunity have passed since its presentation for a proper examination of it, and to make objection to it if there be any. Lockwood *vs.* Thorne, 11 N. Y., 170.

86 The same rule applies where a party to an account sends it for payment to the other by mail. If the party to whom it is sent does not, after a reasonable time has passed, express any objection to it, his silence unexplained is an implied admission that he has none, that the account is correct, and truly, though not conclusively, stated. Terry *vs.* Sickles, 13 Cal., 427.

But it is not an estoppel. Its effect is to establish *prima facie* the accuracy of balance due as stated in the account without further proof. Lockwood *vs.* Thorne, 18 N. Y., 285.

But in cases where there is no claim that the alleged account stated is the result of an express assent or agreement to its correctness by the person sought to be charged thereby, such person must in terms be a party to the account or the grounds upon which it is sought to hold him as a debtor should be clearly made known to him, and a demand for payment should be made. If anything less than this will operate as an admission of the correctness of an account which does not contain as a party thereto the name of the person to whom it may be sent or otherwise delivered and such admission as a *prima facie* liability for its payment, the law by

87 these means is prostituted to purposes not contemplated by its father, who gloried in it as "the perfection of human reasoning."

In this case the account "Bicknell & Morrison in ac. with L. Benites," containing about two hundred and fifty items, was placed in an envelope and sent by mail to Hampton without any accompanying letter or statement expressing why or for what purpose it was sent to him, and without any demand or request for its payment.

The firm name of Bicknell, Morrison & Co. nowhere appears in the account—the name "Hampton" once and in an item as follows: "To balance due on settlement charged to Bicknell, Morrison & Hampton, $350.99." There is nothing in this record showing or attempting to show what the subject-matter involved in the settle-

ment was, who it was with, or the parties to the account, or why this balance was charged to Bicknell, Morrison & Hampton, or why this balance should be charged to the defendant company of Bicknell, Morrison & Company, nor does the record show any claim or attempt to prove that Bicknell, Morrison and Hampton were
88 or that they constituted the defendant firm of Bicknell, Morrison & Company, or that defendant Hampton knew that the plaintiff intended to hold him on this account as partner of Bicknell & Morrison or otherwise, or that this account was sent to him by the plaintiff, or that the plaintiff at that time did or had at any time claimed that Hampton was indebted to him, as partner or otherwise, by reason of any of the transactions represented by this account.

Neither does the record contain anything tending to show how long time this account was on the way between Stockton and Frisco, or how frequently the mails were transferred from one of these places to the other, and of these matters we can take no judicial notice. The record also fails to inform us when this suit was commenced; for aught that appears, it may have been commenced on the day, day after, or day before Hampton received the account; whether a reasonable time after Hampton had received the account had elapsed or not we cannot tell, but it is certain that the record does not show that it had. Judge Story, in his Equity Jurisprudence, § 520, says: "Between merchants at home an account which has
89 been presented and no objection made thereto after the lapse of several posts is treated, under ordinary circumstances, as being by acquiescence a stated account." There is no evidence that even one mail had been conveyed from Frisco to Stockton after the receipt of the account by Hampton and before the action was commenced, and therefore the record fails to show the existence of the facts and circumstances which must exist before the implication of law arises that the account is correct and agreed to as correct by Hampton. The plaintiff having failed to prove the existence of the material facts necessary to the existence of an account stated at the time of the commencement of this action, there was no error on the part of the court in refusing to permit it as such to go to the jury.

And it may further be said that upon trial in the court below the judge undoubtedly had the papers of the case before him, and from them might and probably did know the date of the commencement of the action. It is but just and fair to presume that he did.
90 We cannot say that he did not, and error is not to be presumed—it must be affirmatively shown. The date of the commencement of the action, the length of time between the receipt of the account by Hampton and the commencement of the suit, and the number of mails between Frisco and Stockton during this time may all have been in evidence before the court and the ruling of the court correct on the facts, or they may not have been in evidence; if they were not, there was a lack of evidence of facts which must have existed or the account did not become an account stated. In the absence of any testimony on the subject we cannot assume there was error in the rulings of the court, either in refusing to allow

the account to be read to the jury or in sustaining the motion for a nonsuit. Weggirs *vs.* Burkham, 10 Wall., 129. The judgement of the district court is affirmed.

STEPHEN P. TWISS,
Associate Justice.

Hunter, C. J., concurs.
Emerson, A. J., dissents.

91 [Endorsed:] Filed February 25th, 1884. E. T. Sprague, clerk.

92 *Dissenting Opinion of P. H. Emerson, Ass. J.*

In the Supreme Court of the Territory of Utah.

LOUIS BENITES, Pl'ff and Appellant,

vs.

BICKNELL, MORRISON & HAMPTON, Partners in the Name & Style of Bicknell, Morrison & Co., Def'ts & Resp'd'ts.

I am compelled to disagree with the majority of my brothers in this case on several grounds which are assigned as errors in the trial of this case, but deem it unnecessary to go over all the errors assigned, and shall therefore confine myself in this opinion to one main point or feature of the case.

This is an action brought upon an account stated between the plaintiff and defendants. The complaint states "that on the 31st day of August, 1876, the said defendants as partners were indebted to plaintiff on a balance of account for goods, wares, and merchandize before that time sold and delivered, in the sum of $1,663.70.

"III. That, being so indebted as aforesaid, there was an ac-
93 count stated by and between plaintiff and defendants on the 13th day of August, A. D. 1878, and upon such statement a balance of sixteen hundred and sixty-three and $\frac{70}{100}$ dollars was found to be due from defendants."

But one of the defendants was served with summons or answered, Mr. Hampton.

In his answer both of the foregoing allegations were denied and issues joined upon them.

It is claimed by attorneys for plaintiff that they had the right, under this state of the pleadings, to prove the sale, &c., of goods under the first allegation; and also that an account had been stated under the second. I do not deem it necessary, from the view I take of the case, to decide this point. I may assume all that has been
said by my Bro. Twiss, in the majority opinion, to be correct
94 law, when the proper case for such law is presented, but in this case, I take it, the argument by him has no application whatever.

All that has been said by the majority of the court as regards the stating of an account by implication from the fact the testimony shows the same to have been mailed to Frisco to the defendant Hampton, it does appear to me is evidence that the actual case, as

presented by the evidence, was overlooked by them. If, as they assumed, the plaintiff had depended upon the establishing of an account stated by showing that the same was made and mailed to defendant at his place of residence in another part of the Territory, it would possibly have been necessary to have shown that there was a mail between the two points, and the usual time it would take for a letter to go from the point of mailing to the point of destination; but this is not the case made by the record. It, of course, does appear from the testimony of the plaintiff that the account
95 marked Ex. "A" was so made out and mailed, but it is further shown that this same account was the subject of conversation between the plaintiff and defendant; that in that conversation the defendant Hampton admitted he had received the account, and that he also admitted it was correct. Now, if this does not make an account stated by the positive and uncontradicted statements of the defendant, it would be very hard indeed to find a case where proof could be made that an account had been stated between parties at all, and it makes no difference that the account as sent to Hampton was for a page or two against Bicknell & Morrison, as that was balanced up and the balance brought down and charged to the defendants in this case as the first item of charge, and in pursuance of the agreement between the three defendants to this action, as sworn to by one of them, H. O. Bicknell. It will not do to say that because this account, as claimed by plaintiff, had been sent to Hampton
96 his admission that the same had been received by him, that it was correct, and that he owed it, except possibly a matter of $200.00 he claimed he should have been credited with had the names of Bicknell & Morrison — account preceeding it; that Hampton can so trifle with justice and escape upon what does not appear to me to be even a technicality.

In addition to the foregoing facts, which appear on the record in this case on pages 29, 42, & 43, it is also shown that plaintiff's counsel gave notice to defendants to produce the statements of the account so admitted to have been received, and the same was by them produced in court by the defendant, thus removing all doubt upon the question as to his having so received it. The testimony further shows that the conversation which took place between plaintiff and defendant had reference to this document and none other, as the witness first examines it, identifies it as the one he sent, then says this conversation was about the one you now hold in your
97 hand, and he admitted that account to be correct. How any stronger case could have been made to show an account had been stated is, as before stated, beyond my comprehension, and why the majority of the court could have overlooked or disregarded all these facts is something I do not very clearly understand. From their opinion I gather the idea that they have assumed there is no evidence tending to show an account stated, except by presumption, from the testimony, which shows that this account was made out and mailed to the defendant Hampton at Frisco, his place of residence. I might have been willing to have concurred with my brothers if such had been the only evidence. On the trial below the

evidence tending to prove an account stated was excluded on the ground of a variance between the form of the count declared on and the form of account attempted to be proved. It was claimed and ruled
98 that because the writing containing the account began with the words, as a heading, "Bicknell & Morrison," there was variance from the complaint, which stated generally that there was an account stated between plaintiff and defendants. I cannot agree with this view. No particular form of account was alleged in complaint, and none was necessary. If the minds of the parties met on any balance that would be an account stated, and any evidence tending to show that their minds did meet would be pertinent in whatever form it might be stated. It might ostensibly be made to third parties entirely, or it might have no heading at all, but merely rough figures, or it might be verbal and not even in writing. Certainly the objection of variance would not be good when no particular form is alleged in complaint.

P. H. EMERSON.

Filed July 7th, 1884.

E. T. SPRAGUE, *Clerk.*

99 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of a writ of error hereto attached, do herewith return to the Supreme Court of the United States said writ, a citation issued thereon, with proof of service thereof, a transcript of the record and proceedings, bond on writ of error, opinion of said supreme court of said Territory, and dissenting opinion of one justice thereof, all in the cause in said writ mentioned; and I hereby certify that said transcript of the record, proceedings, bond, and opinions so attached is a true, full, correct, and completed copy of the several originals thereof on file or of record in my office.

Witness my hand and the seal of said supreme court of said Territory this 8th day of July, 1884, at Salt Lake City.

[Seal of Supreme Court, Territory of Utah, United States of America.]

E. T. SPRAGUE.
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Utah Territory supreme court. No. 330. Louis Benites, plaintiff in error, *vs.* Benjamin Hampton. Filed 1st October, 1884.

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P. H. EMERSON.

Filed July 7th, 1884.

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99 TERRITORY OF UTAH, } ss.
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[Seal of Supreme Court, Territory of Utah, United States of America.]

E. T. SPRAGUE.
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Utah Territory supreme court. No. 330. Louis Benites, plaintiff in error, *vs.* Benjamin Hampton. Filed 1st October, 1884.

Supreme Court of the United States.

OCTOBER TERM 1887.

No. 55.

LOUIS BENITIS, Plaintiff in Error,

vs.

H. O. BICKNELL et als., Defendant in Error.

BRIEF FOR DEFENDANT HAMPTON.

S. S. SHELLABARGER,
J. M. WILSON,
Attorneys of Defendant Hampton.

Press of Thomas McGill & Co., Washington, D. C.

IN THE

Supreme Court of the United States.

LOUIS BENITES, Plaintiff in Error,
vs.
H. O. BICKNELL ET ALS., Defendants in Error. } No.

Brief for Defendants in Error.

I.

We ask, on behalf of defendants in error, that this case be affirmed, for non-compliance with the twenty-first rule, in this, viz.:

(A) The brief for plaintiff in error does not contain an abstract or statement of the case.

(B) It does not contain an assignment of errors.

(C) A glance at this brief will show that it is mainly devoted to the discussion of the rulings of the District Court *touching the admission* and *rejection of evidence.*

The rule as to this is wholly ignored. There is not in any form any statement of the full substance of the evidence admitted or rejected, as the rule requires.

At page 31 of the record will be found an assignment of errors, which is attached to a "statement of the case" made up for the purposes of "appeal and motion for a new trial." (Record, p. 2.)

If this assignment of errors were available here, which we controvert, still it does not satisfy this rule, in this, that

"*the full substance of the evidence admitted or rejected*" is not "quoted."

Portland Co. *v.* United States, 15 Wall., 1.
Treat *v.* Jemison, 20 Wall., 652.

II.

There is no bill of exceptions or "statement" equivalent to a bill of exceptions by which any questions in the case are reserved for consideration in this court.

The only thing in the record that can be relied upon to answer the purpose of a bill of exceptions is the "statement" beginning on page 2 of the record with the heading "PROPOSED STATEMENT ON APPEAL AND MOTION FOR A NEW TRIAL."

This of course was intended to apply to the motion for a new trial in the District Court, and, as we understand the record, to an "appeal" to the Supreme Court of the Territory, but has no reference to the preservation of questions for the consideration of this court on writ of error. At the end of that statement (Record, p. 32) is the following stipulation:

"We, the undersigned, E. D. Hoge & A. Brown, att'ys for plaintiff, and Marshall & Royle, att'ys for def't Hampton, hereby certify that the foregoing statement has been agreed upon by us, and the same is correct."

This stipulation, we submit, is not to bring here for consideration any of the questions presented in that assignment of errors. It relates only to a motion for a new trial and an appeal to the District Court. It does not relate to questions on a writ of error to this court.

Kerr *v.* Clampsite, 95 U. S., 188.
Head *v.* Hargrave, 105 U. S., 45.

III.

Without waiving any of these objections, should the court enter upon an examination of the record, the case

will be found to be this, which we submit in reply to the brief that has been filed on behalf of the plaintiff in error, to wit:

1. The suit was brought against H. O. Bicknell, E. Morrison, and Benjamin Hampton, late partners, on an alleged account stated against said firm. Hampton alone appears to have been served with proeess, and he alone answered. (Record, p. 2.) It was not a suit to recover on an itemized account for goods sold and delivered.

2. There had been in existence a firm under the name and style of Bicknell & Morrison, composed of H. O. Bicknell and E. Morrison. Subsequently Mr. Hampton became a partner, and the firm was then known as Bicknell, Morrison & Co.

The plaintiff in the suit claimed that he had placed an account in an envelope, (Record, p. 8,) and sent it by mail to the defendant Hampton. This account was made out against Bicknell & Morrison, not against Bicknell, Morrison & Co. Much of it purported to be an account against Bicknell & Morrison. No letter accompanied this paper that was transmitted to Hampton, nor was any demand made upon him for the payment of the account, or its recognition as a valid account, unless such demand could be implied from the fact that it was sent to him in the manner above stated—in an envelope by mail.

To this Hampton made no reply; and on the trial it was sought to make this appear to be an account stated, because no reply was made. In other words, the contention is that, since Hampton made no answer, there was an implied acquiescence in the correctness of the account, and thereby it became in law, and for the purposes of that case, an account stated.

On the trial of the case there was some controversy over the production of this account by the defendants. Finally,

it was produced and identified by the plaintiff, who was a witness on the stand. (Record, p. 19.) Upon being produced, it proved to be an account against Bicknell & Morrison, and not against Bicknell, Morrison, & Hampton; and the court held that, it being an account different from the one which was sued upon as an account stated, it was not competent to be given in evidence.

But the paper having been produced, and being in court, and the plaintiff being on the witness-stand, his counsel undertook to prove by him that Hampton had, in a conversation with him when they first met, after the paper had been transmitted by mail, as above stated, admitted the correctness of it, and thereby made it an account stated; but the plaintiff himself, on cross-examination, (page 20,) testified that, instead of his having admitted it to be correct, he (Hampton) disputed its correctness, and claimed that there was a credit that should be given of $200, thereby making it not an account stated, but an account disputed.

This credit of $200 was not given on the account which the plaintiff identified, nor was it given in the case; and hence the case stood in the attitude not only of the paper sent being different from the one declared upon, but upon the evidence of the plaintiff himself that even that paper was not assented to, but was disputed. So that it was, we submit, a legal impossibility in the case to render a verdict in favor of the plaintiff.

In this aspect of the case, the plaintiff then undertook to relieve himself from this difficulty by introducing evidence to prove the account itself as an itemized account, but the court overruled this offer, and for the very obvious reason that the defendants had not been called upon to answer as to this itemized account, but only as to an account stated. The court will see, from the record in the case, that if this account had been sued upon as a bill of items, instead of an account stated, a defense might have been, and would have been, set up against it, and of which the de-

fendants would have been deprived if that kind of investigation had been permitted. Upon the principle that pleadings are to be construed strictly against the pleader, the plaintiff in this case could not complain of a ruling of the court which required him to prove the case as he had made it, to wit, to prove an account stated.

The statute of Utah in relation to non-suit is as follows ("Laws of Utah, 1884," p. 232):

"SEC. 455. An action may be dismissed or a judgment of non-suit entered in the following cases: * * *

"5. By the court on motion of the defendant when upon the trial the plaintiff fails to prove a case sufficient for the jury."

Upon the case made by the plaintiff, as disclosed by this record, we submit that under this statute, and even without such a statute, the court was right in dismissing the case, and we ask that the judgment be affirmed.

S. SHELLABARGER,
J. M. WILSON,
Att'ys of Def't Hampton.

123-5-19

Office Supreme Court U. S.
FILED
MAY 12 1887
JAMES H. McKENNEY,
CLERK.

In the Supreme Court,

UNITED STATES.

LOUIS BENITES,
Plaintiff in Error.
vs.
H. O. BICKNELL, E. MORRISON, and BENJAMIN HAMPTON, late partners, doing business under the name and style of Bicknell, Morrison & Co.,
Defendants in Error.

APPELLANT'S BRIEF.

E. D. HOGE,
Atty. for Plff. in Error.

In the Supreme Court,

UNITED STATES.

LOUIS BENITES,
Plaintiff in Error.
vs.
H. O. BICKNELL, E. MORRISON, and BENJAMIN HAMPTON, late partners, doing business under the name and style of Bicknell, Morrison & Co.,
Defendants in Error.

APPELLANT'S BRIEF.

There are fifteen assignments of error in this cause, but the principles upon which the case turns may be limited to a few points. The plaintiff complains that on the 31st day of August, 1876, the defendants were indebted to him for a balance of goods, wares and merchandise. This, of itself, would be a cause of action; in addition thereto, however, the plaintiff alleges that this cause of action was crystalized into the form of an account stated, on the 14th day of August, 1878, and that the amount of the account stated was $1,663.70.

The plaintiff seeks to establish his claim by evidence tending to show that he sent the items of his account to defendant Hampton; that Hampton received it without ob-

jection, and afterwards admitted and stated that it was correct, except that there was a credit or counter-claim of a note of two hundred dollars, which he wished allowed against him. To establish this theory the plaintiff called certain witnesses to testify that Mr. Hampton had stated that he had received the said items of account, and that they were correct with the exception aforesaid; but, because it also appeared that in the course of the conversation there was a discussion as to whether the matter could be settled or not, and the whole affair compromised, the court excluded this admission of Hampton, on the ground that the law, for the purpose of facilitating and encouraging compromises, would regard as privileged, any statement of fact made in connection with, or during the conversation where the subject of compromise was mentioned. This, we think, was error on the part of the Judge of the court below. The law only protects and excludes from evidence those statements which are made particularly for the purpose of, and to aid to complete, a compromise. Any statement of fact is not privileged though made in the course of a compromise. It is merely the offers that are privileged.

2 Wharton on Evidence, Sec. 1090.
Brown vs. Hollister, 19 Mich., 166.
Eastman vs. Amoskeag, 44 N. H., 143.
49 Vt., 296.
8 Cushing, 513.
1 Greenleaf Ev., 192 and notes.

II

The account which we have mentioned as having been sent to Hampton was not produced by defendant when demanded; notice had been served on his counsel, and on him, when the trial commenced. Counsel demanded that the defendant should produce the account, and defendant's counsel refused to do so, and objected to the court compelling the production; the court did not seek to compel the production, and, after having ruled that we had made a showing, and on the strength of that refusal, permitted the plaintiff to put in secondary evidence; then the defendant, for the purpose of avoiding the effect of that showing, pro-

duced the account. The court then refused to permit the secondary evidence offered to go in. This was an error: the defendant having once refused to produce the account, could not afterwards introduce it to protect himself by it.

1 Greenlf. Ev., Sec. 560 and note.

III.

When the account was produced it was discovered that over the heading of the first page of it, were the words, "Bicknell & Morrison,"—see account in Record—omitting the words "& Co.," or omitting the words "& Hampton," and such was the fact.

The account, however, on the third page of it as copied, shows that on the 30th day of June, 1875, the balance then due, if balance it was, had been passed to the account of Bicknell, Morrison & Hampton, and was subsequently carried on in their name, nearly all the items for which suit was brought, having been obtained while the firm existed under the name of Bicknell, Morrison & Hampton, or Bicknell, Morrison & Co., so that the account on its face, taking it altogether, shows that the man who sent it and made it out, claimed that Bicknell, Morrison & Hampton were indebted to him as partners in the balance of $1,663.70. This alone would make an account stated. It made no difference to whom the items had been charged, or in what name or in what form the account had been kept. When Mr. Hampton saw by the letter which he received containing the account, that a balance of $1,663.70, was claimed against him as one of the partners, and when he assented to that account by his silence, and by his subsequent statement, that made an account stated in the language of the complaint, namely, an account stated between plaintiff and defendant on the 13th day of August, 1878; and when he admitted that in subsequent conversations, that was a promise to pay that account stated. The court erroneously ruled that there would be a variance on that subject. We call attention to a general discussion of what an account stated is as found in the following authorities:

Second Greenlf. Ev. Secs. 126, 7 and 8, and note admissions.